FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 10 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

(484 - pet rehearing follows this)

No. 485

NATHAN SILVERMAN,

Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WARREN O. COLEMAN,
Counsel for Petitioner.

408 Whitney Building,
New Orleans 12, La.

SUBJECT INDEX.

	PAGE
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT	1
SUMMARY	2
OPINION OF THE COURT BELOW	2
JURISDICTION	3
STATUTES INVOLVED	3
SPECIFICATION OF ERRORS	4
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	8
1. (a) In Holding that there was no Prejudicial Variance between the Indictment and the Proof, the Circuit Court has Decided an Important Question affecting the Proper Administration of Justice in Federal Courts in a Way Probably in Conflict with the Recent Finding of this Court in Kotteakos vs. United States, ... U. S. ..., (90 L. Ed. 1178), Particularly in View of the Circuit Court's Alternative Finding that if Petitioner Was Not Engaged in the General Conspiracy but Was Engaged in a Minor Conspiracy, that the Minor Conspiracy was so Closely Connected with the General Conspiracy that Petitioner's Substantial Rights were Unaffected	8
Preliminary Statement	8
The Proof	9
Argument	12

SUBJECT INDEX—(Continued)

PAGE

Reasons Relied On, etc.—(Continued):

II. In Upholding the District Court's Charge Concerning Reasonable Doubt and the Presumption of Innocence, viz: (a) That the Presumption of Innocence Does Not Apply to a Defendant who is in fact Guilty so that he may Escape Just Punishment; (b) that said Presumption becomes Inapplicable as soon as Prima Facie Evidence of the Truth of the Charges is Presented to the Jury; (c) That said Presumption is No Evidence At All and Plays Its Part only so Long as there is Absence of Legal Evidence as to the Particular Fact to be Established; (d) That Reasonable Doubt is a doubt for which a Reason may be Given; The Circuit Court has Decided an Important Question of Federal Law Probably in Conflict with Applicable Decisions of Other Circuit Courts of Appeal and of this Court 23

Preliminary Statement 23

Circuit Court Erred in Stating Trial Court Corrected Errors in Charge 25

Argument 25

This Court, in Coffin v. U. S., 156 U. S. 432, 458, 462, Differentiates between "Reasonable Doubt" and "Presumption of Innocence" Rule. The Presumption of Innocence is Evidence 26

Erroneous Instruction on Presumption of Innocence Aggravated when Coupled with Erroneous Instruction Defining Reasonable Doubt as being "A Doubt For Which A Reason Can Be Given" 29

SUBJECT INDEX—(Continued)

PAGE

Reasons Relied On, etc.—(Continued):
III. In Overruling the Claim that the District Court Erred in Refusing to Charge the Jury that the Failure of the Petitioner to Testify should not Create a Presumption against him, and should not be Used in the Discussions or the Deliberations of the Jury, Until the Jury had Deliberated about Six Hours, the Circuit Court of Appeals has Decided a Federal Question Involving a Congressional Command or Policy Probably in Conflict with a Decision of this Court, to-wit: Bruno v. U. S., 308 U. S. 287 32
Preliminary Statement 33
Argument 34
The Objection and Bill was Timely Noted 37
Accused was Entitled to Instructions Before Jury Retired 38
Discussion of the Law Re Effectiveness of Correction of Error by Court's Admonition to Jury 40
Test Stated as to When Admonition by Court Cures Error 41
Résumé 44

CONCLUSION 46

APPENDIX 47, 48

LIST OF AUTHORITIES CITED.

Table of Cases.

PAGE

Ayer v. Territory of New Mexico, (8 Cir.) 201 F. 497 31
Baker v. U. S., (8 Cir.) 115 F. (2d) 533, 540 8
Barnes v. U. S., (8 Cir.) 8 F. (2d) 832, 834 42
Berger v. U. S. 295 U. S. 78 .....5, 15, 16, 17, 21
Blue v. U. S., (6 Cir.) 138 F. (2d) 351, 359 8
Brasfield v. U. S., 272 U. S. 448, 450 31
Bruno v. U. S., 308 U. S. 287 .....6, 32, 33, 34, 35, 36, 37, 38, 40, 44, 45
Chadwick v. U. S., (5 Cir.) 141 F. 225; 117 F. (2d) 902, 905 42
Cochran v. U. S., (8 Cir.) 41 F. (2d) 193, 199, 200 8
Coffin v. U. S., 156 U. S. 432, 458, 462 .....24, 26, 28
Davis v. U. S., 160 U. S. 469, 487 28
De Mayo v. U. S., (8 Cir.) 32 F. (2d) 472 43
Dunlop v. U. S., 165 U. S. 486 42
Edwards v. U. S., (8 Cir.) 7 F. (2d) 357, 360 14
Ezzard v. U. S., (8 Cir.) 7 F. (2d) 808, 811 .....24, 28
Frantz v. U. S., (6 Cir.) 62 F. (2d) 737, 739 41
Gomila v. U. S., (5 Cir.) 146 F. (2d) 372 .....24, 31
Grantello v. U. S., (8 Cir.) 3 F. (2d) 117, 120, 121 ... 41
Graves v. U. S., 150 U. S. 118 42
Griggs v. U. S., (9 Cir.) 158 F. 572, 578 31
Haning v. U. S., (8 Cir.) 21 F. (2d) 508, 510 14
Hibbard v. U. S., (7 Cir.) 172 F. 66, 71 40
Kopold-Quinn Co. v. U. S., 101 F. (2d) 633 8
Kotteakos v. U. S., ... U. S. ...;
90 L. Ed. 1178 ..5, 8, 10, 12, 13, 16, 17, 18, 20, 21, 36, 40
Lambert v. U. S. (CCA. 5) 101 F. (2d) 961, 964 31
Lilienthal's Tobacco v. U. S., 97 U. S. 237, 266, 267 28
Linde, et al. v. U. S., (8 Cir.) 13 F. (2d) 59, 61 13
Looker v. U. S., (2 Cir.) 240 F. 932, 935 44
Lockhart v. U. S., (9 Cir.) 35 F. (2d) 905, 906 44

LIST OF AUTHORITIES CITED—(Continued)

Table of Cases—(Continued)

PAGE

Mackett v. U. S., (7 Cir.) 90 F. (2d) 462, 464 8
Mansfield v. U. S. (8 Cir.) 76 F. (2d) 224 31
Marcante v. U. S., (10 Cir.) 49 F. (2d) 156, 157 ....11, 13
McAdams v. U. S., (8 Cir.) 74 F. (2d) 37, 40 .....24, 28
McKnight v. U. S., (6 Cir.) 115 F. 972 41
Middleton v. U. S., (8 Cir.) 49 F. (2d) 538, 540 43
Murphy v. U. S., (3 Cir.) 33 F. (2d) 896 31
Owen v. U. S., (9 Cir.) 130 F. 279, 283 31
Paddock v. U. S., (9 Cir.) 79 F. (2d) 872, 877 32
People v. Paulsell, 115 Cal. 6, 46 P. 734 32
Pettine v. Territory of New Mexico, (8 Cir.) 201 F. 489, 495 .....29, 31
Pharr v. U. S., (6 Cir.) 48 F. (2d) 767, 770 41
Pinkerton v. U. S., ... U. S. ..., 90 L. Ed. 1212 8
Ridneur v. U. S., (3 Cir.) 14 F. (2d) 888, 892 14
Siden v. U. S., (8 Cir.) 9 F. (2d) 241, 244 14
Throckmorton v. Holt, 180 U. S. 552 44
Tinsley v. U. S., (8 Cir.) 43 F. (2d) 890, 897, 898 ....13, 14
Trunietti v. U. S., (8 Cir. 2 F. (2d) 15, 17 14
U. S. v. Atkinson, 297 U. S. 157, 160 31
U. S. Ex Rel. Coy v. U. S., 316 U. S. 342 3
U. S. v. McConnell, (D. C.) 285 F. 164, 165 13
U. S. v. Wood, (2 Cir.) 66 F. (2d) 262, 265 31
Volknor v. U. S., (6 Cir.) 13 F. (2d) 594 41
Waldron v. Waldron, 156 U. S. 361, 363 .....42, 44
Ward v. U. S., (5 Cir.) 96 F. (2d) 189, 192 31
Wilson v. U. S., 149 U. S. 60 .....42, 44
Wright v. U. S., (8 Cir.) 227 F. 855, 857 14

STATUTES AND OTHER AUTHORITIES.

	PAGE
23 C. J. S., Sec. 1280, 1268	31
Federal Rules on Criminal Procedure	3
Fifth Amendment to Constitution of United States	45
Mail Fraud Statute; 18 U. S. C. 338	2, 3
Rules XI and XIII, Criminal Appeals Rules	3
Section 240 (a) Judicial Code, as amended	3
Securities Act of 1933, 15 U. S. C. 77q	2, 3
Title 28, U. S. C. A. Section 632	34, 43, 45

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM 1945.

No. .....

NATHAN SILVERMAN,

Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, NATHAN SILVERMAN, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on July 10, 1946, (R. 2410), rehearing denied August 12, 1946, (R. 2440), affirming the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, entered on March 24, 1944, (R. 183), which sentenced petitioner upon a verdict rendered by a jury on March 10, 1944, (R. 132-133).

SUMMARY.

The indictment (R. 2), in seven counts, was returned September 4, 1942. It charged petitioner, together with thirteen others in Counts One, Two and Three with violating the Securities Act of 1933, being the Act of May 27, 1933, C. 38, Title 1, 48 Stat. 84, Sec. 17(a) (15 U. S. C. 77q); and in Counts Four, Five, Six and Seven with violations of the Mail Fraud Statute Criminal Code Section 215, (18 U. S. C. 338). All counts charged the same scheme differing only in the "mailings" specified. A verdict was directed by the court on Count Three, and Counts Six and Seven were dismissed. Defendants' motions for a directed verdict on Counts One, Two, Four and Five were denied. Nine of the defendants were brought to trial, convicted and sentenced. Petitioner was sentenced to serve six years; five years on Count Four, and one year on Count Five, with a sentence on Counts One and Two of five years to run concurrently with the sentence on Count Four. (R. 183, 184.)

OPINION OF THE COURT BELOW.

The District Court (Caillouet, D. J.) filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (per Hutcheson, C. J., R. 2397).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 10, 1946, (R. 2410), and a petition for rehearing was denied August 12, 1946, (R. 2440). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this court May 7, 1934, and *U. S. Ex Rel Coy v. U. S.*, 316 U. S. 342. So also Rule 37 Federal Rules on Criminal Procedure effective March 21, 1946.

STATUTES INVOLVED.

I. The Mail Fraud Statute, Criminal Code Section 215, as amended (18 U. S. C. 338), reads, in part, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than $1000.00 or imprisoned not more than five years, or both."

II. The Securities Act of 1933, Act May 27, 1933, C. 38, Title 1, 48 Stat. 84, Sec. 17(a); (15 U. S. C. 77q (a) (1)) reads, in part, as follows:

> (a) "It shall be unlawful for any person in the sale of any securities by the use of any means or

instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly * * *."

(1) To employ any device, scheme or artifice to defraud * * *."

SPECIFICATION OF ERRORS.

I.

(a) The court below erred in holding that this petitioner was a member of the comprehensive conspiracy as laid in the indictment; and after alternatively expressing doubt that he was a member of such conspiracy, further erred in holding that his substantial rights were not affected. The court erred in its alternative finding that if there were two conspiracies, one between Baker[1] and the other defendants, and another between petitioner, Baker and some of them, that the minor conspiracy in which petitioner was found to have been engaged in was so closely connected with the main, the general conspiracy, that the variance could not affect, and has not affected, petitioner's substantial rights. This finding requires a separate consideration of petitioner's status apart from that of his co-defendants who have independently applied to this court for writs of certiorari.

(b) In reaching this conclusion, the court below failed to consider the undenied fact that twenty-five separate conspiracies to defraud individuals were separately proven, and that petitioner concededly had no part in or knowl-

[1] Alleged to be the pivot around which the whole scheme revolved.

edge of sixteen of them; that of the other nine, he made some sales of land, but there is insufficient evidence to show that he had any connection with other alleged co-conspirators who later sold land, they being his competitors, who were able to learn the names of persons interested in purchasing when the deeds were recorded in public records, except as to three or four defendants in a few of the remaining nine separate smaller conspiracies with which petitioner was linked.

(c) The court further erred in holding *Berger v. U. S.*, 295 U. S. 78, controlling. That case was a single count conspiracy, whereas, our case is a seven count conspiracy. The principles of prejudicial error enunciated in *Kotteakos v. U. S.* ... U. S. ..., (90 L. Ed. 1178), are particularly applicable in that the jurisdiction of federal courts arises in this case by reason of the use of the post-office establishment of the United States. Proof of mailings on certain counts was imputed to petitioner by reason of the Circuit Court's alternative finding of his membership in a closely connected separate conspiracy, notwithstanding the court's expressed doubt that petitioner was party to the general conspiracy; hence, his substantial rights would necessarily be affected if he was not a member of the general conspiracy on each particular mailing count. A collateral conspiracy, even though closely connected, is insufficient to impute responsibility for a mailing, which is the gist of the offense.

II. The court erred in charging the jury on the law relative to the presumption of innocence, and on the law relative to reasonable doubt. The instruction erroneously

stated that the doctrine of the presumption of innocence did not extend to one who in fact was guilty; that the presumption of innocence will avail the defendants no further, so soon as *prima facie* evidence of the truth of the charges is presented to the jury; that the presumption is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established; that if such *prima facie* evidence, which so brushes aside the presumption of innocence is not met by the defendants' opposing satisfactory evidence, then that simple *prima facie* evidence, if it convinces the jury beyond a reasonable doubt, would justify the jury in rendering a verdict of guilty as charged, (R. 1703, 1716).[2] It is submitted that all of said instructions constitute basic error.

III. (a) The court erred in refusing the requested charge: that the failure of petitioner to testify in his own behalf does not create any presumption against him; that the jury must not permit that fact to weigh in the silghtest degree against him; *nor should this fact enter into the discussions or deliberations of the jury in any manner.* This, being in flagrant violation of the rule laid down by this court in *Bruno v. U. S.*, 308 U. S. 287, was reversible error.

(b) The Circuit Court erred in upholding the belated attempt of the Trial Judge to rectify this error after the jury had deliberated for six hours. Such belated instruction; telling the jury not to permit the fact that the de-

[2] The relevant portions of the charge which was challenged is quoted on p. 23 of this petition.

fendant failed to testify, to enter into the discussions or deliberation of the jurors; necessarily would be ineffective as the jury had already let that fact enter into their deliberation for six hours when the supplemental charge was given.

(c) Although proper exception and bill was reserved when the court refused to so charge, before the jury retired, the court below erred in holding that a second exception was necessary as such exception would have availed the court nothing further to correct; the fundamental error was a *fait accompli;* the damage done was then irrevocable.

(d) The Congressional mandate, upheld in the *Bruno* case *supra,* entitled petitioner as a matter of statutory right to such charge, and this clearly implies that he was entitled to it at a time when it would be effective, i. e., prior to the retirement of the jury for deliberation.

(e) In any event, the Circuit Court erred in not applying the proper test to determine the effectiveness of the correction made by the court; i. e., whether the error was so fundamental and serious as to affect the minds of the jury and thus disqualify them. Correction to be effective must be prompt. *Moreover, the court erred in giving no consideration at all to the rule that the deprivation of a right given accused by a specific command of Congress is presumptively prejudicial.*

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. In Holding that there was no Prejudicial Variance between the Indictment and the Proof, the Circuit Court has Decided an Important Question Affecting the Proper Administration of Justice in Federal Courts in a Way Probably in Conflict with the Recent Finding of this Court in Kotteakos vs. United States, ... U. S. ...; (90 L. Ed. 1178) Particularly in View of the Circuit Court's Alternative Finding that if Petitioner was not Engaged in the General Conspiracy, but was Engaged in a Minor Conspiracy, that the Minor Conspiracy was so Closely Connected with the General Conspiracy that Petitioner's Substantial Rights were Unaffected.

Preliminary Statement.

The indictment (R. 2) in seven counts charges fourteen persons, including petitioner, with a general scheme to defraud. This in law is a comprehensive conspiracy.[3] It is suggested that the alternative finding of the Circuit Court, to-wit: "If, however, we are mistaken in this, and there were two conspiracies, one between Baker and the other defendants and another between Silverman [petitioner], Baker and some of them, it is perfectly clear that the conspiracy in which Silverman was engaged, if it was a separate conspiracy, was so closely connected with the main, the general conspiracy, as that the variance could not effect and has not affected, his substantial rights and

[3] C/f *Pinkerton v. U. S.*, ... U. S. ..., 90 L. Ed. 1212; *Cochran v. U. S.*, (8 Cir.) 41 F. (2d) 193, 199, 200; *Mackett v. U. S.*, (7 Cir.) 90 F. (2d) 462, 464; *Baker v. U. S.*, (8 Cir.) 115 F. (2d) 533, 540; *Blue v. U. S.*, (6 Cir.) 138 F. (2d) 351, 359.

the principles laid down in *Kopald-Quinn Co. v. U. S.*, 101 F. (2d) 633, and *Berger v. U. S.* 295 U. S. 78 controls," requires a separate consideration of petitioner's status apart from that of his co-defendants, who have independently applied to this court for writs of certiorari.

The scheme concerns the sale as oil bearing and otherwise valuable land, which the indictment charges was sold through misrepresentations and fraud and that the land was swamp and marsh land of little value. The evidence showed transactions by individuals or in some instances separate groups of the defendants on widely varied dates occurring separately in many of the Southern States, particularly Louisiana, Mississippi, Florida and Tennessee.[4] The indictment (R. 2) alleges that:

> "It was a part of said scheme and artifice to defraud that the said defendants and the said confederate[5] would and they did own, dominate and control the Plaquemines Land Company, a Louisiana corporation, which said corporation had acquired and owned approximately 27,535 acres of unimproved marsh and swamp lands located in Plaquemines and St. Bernard Parishes, Louisiana."[6]

The Proof.

We submit that the jury could not possibly have found, upon the evidence, that there was only one conspiracy.

---

[4] See the Appendix for chart relative to the relations of the defendants in each conspiracy.

[5] One of the defendants named was deceased, hence called "confederate".

[6] This was the key allegation from which one would suppose that the defendants were using that corporation to further their own ends. The allegation was abandoned, as the proof showed that defendant Baker owned the Corporation, (R. 1670), and that petitioner had nothing to do with it except to purchase land from it for cash.

Insofar as the aforesaid key allegation was concerned, it was abandoned *in toto* by the prosecution, as the proof showed that instead of the defendants owning, dominating and controlling that corporation it was actually owned by Baker.[7] It was sought to be shown, contrary to this key allegation, that each defendant was linked to Baker, who owned the corporation, in one or more transactions, and that it was possible for the jury to conclude that all were in a common adventure, because of this fact, as well as the similarity of purpose presented in the various sales of land. The similarity of this situation and the *Kotteakos* case is striking, for there this court said:

> **"The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similiarity of purpose presented in the various applications for loans."** [8]

---

[7] The Plaquemines Land Co. was incorporated on March 4, 1911, a Louisiana corporation domiciled in New Orleans, Louisiana, (R. 1669, G. 413, R. 2291). Defendant Millard C. Baker owned 200 shares, L. L. Baker, 49 shares and G. H. Randolph 1 share. The capital investment was $25,000.00. (R. 1670.)

[8] Our brief, filed in the Circuit Court, long before the decision in the *Kotteakos* case was handed down, made the following statement:

"The Government contended that Baker was the pivot around which the other defendants moved, but, no evidence was offered except to show that Baker conspired with separate groups at certain times, but that in most of the transactions defendant had no part in nor knowledge of. Silverman was connected with Keifer & Silverman, Inc., (registered with and reporting to the Securities & Exchange Commission), a corporation dealing in the sale of oil royalties, oil lands, stocks and bonds, etc. Keifer was an officer in the United States Army at the time of trial—hence was not tried with the other defendants."

Quo ad petitioner, the proof utterly failed to establish the comprehensive conspiracy or general scheme as laid in the indictment. On the contrary, it showed a series of small conspiracies different and disconnected, and wholly apart from and without relation to others conspiring to do the thing forbidden. What the evidence offered by the Government did actually show was a series of numerous small conspiracies by certain groups of the defendants, but it did not prove nor connect up by proof the members of the several group conspiracies with one another, or, as stated in *Marcante v. U. S.* (C. C. A. 10) 49 F. (2d) 156, 157: *"It forged the links but failed to join them into a chain."*

The evidence in the case shows that Baker, the owner of the Plaquemines Land Co., dealt with petitioner at arms length. He sold the land to petitioner for a set price; demanding cash in advance. This is shown conclusively by reference to the indictment letters in Count I (R. 19) where the mail fraud count letters show that the deed to certain property purchased by petitioner was sent to the Deposit Guaranty Bank of Jackson, Mississippi, March 1941, the instructions being to deliver to petitioner the deed only upon his paying the sum of $112.50, plus charge of handling, which amount was to be remitted to the Plaquemines Land Co. The same method of handling the transaction is shown in the indictment letter of Count II (R. 21). This clearly shows that petitioner and Baker dealt at arms length, not as principal and agent nor as collaborators. The other defendants had access to the public tax and conveyance records, and could ascertain who had made a purchase of the land and could have con-

tacted them on their own account in an effort to sell a prospect who had previously purchased.[9] There is no evidence that any division of profits was made among the alleged conspirators.[10]

Argument.

There was no clear and consistent theory as to petitioner's connection with the fraudulent scheme. If this was not a general comprehensive conspiracy, it was highly prejudicial and highly improper for the Court to charge as binding upon petitioner the acts of others happening in different cities and between widely different dates. This is not such a case, e. g., the key man owns and operates a bucket shop and employs salesmen to work on a salary or commission basis, they being schooled to carry out the comprehensive plan or conspiracy, all contributing in varying degrees to the success of the unlawful enterprise. The evidence in this case plainly shows that petitioner had no other purpose in mind than that of carrying out his own individual operations, sometimes co-operating with three or four of the other defendants.

True, the Government need not prove all it alleges, but it does have the burden of proving that petitioner was a member of a single comprehensive conspiracy to violate the laws charged. It is not sufficient to merely prove that one group among those indicted, conspired with Baker in

---

[9] This, of course, is a self-evident fact, and it was natural that as competitors their paths at times crossed.

[10] It is most significant that none of the defendants testified for the Government which is usual in cases where a large group is in an actual conspiracy, e. g., the testimony of Brown, spoken of as "the common center" around whom the spokes of the wheel met in the *Kotteakos* case.

one locality on one day, and petitioner and another group conspired with Baker in another locality on another date in separate conspiracies. Even if it were conceded *arguendo* that Baker, as owner of the Plaquemines Land Co., was engaged in a broad single conspiracy rather than several individual ones, it would not follow that petitioner was so engaged.

The Government's strategy of holding a mass trial has by force of numbers and transactions built up a record that was intrinsically prejudicial to petitioner. This method of proceeding was selected in preference to securing separate indictments of the separate groups shown to have conspired to violate the law. The Government sought to submit the question of guilt as to all of the defendants in one indictment notwithstanding the fact that the testimony as to each was different.[10a] Long before the *Kotteakos* case, it had been stated by federal courts that this practice is not to be encouraged because of the confusion produced and the extreme difficulty for even an experienced trial judge to protect the individuals charged. Further, that with inexperienced jurors, such complicated testimony was apt to become a confused jumble, giving the jurors the impression the defendants are guilty of something, with little reference to the crime with which they are charged.[11]

[10a] See the ruling in the bill of exception taken (R. 1094) wherein the Court ruled that all of these defendants having been charged with entering into a scheme and artifice to defraud together were effectively charged with a conspiracy. See also the extensive general charge of the court on the law relating to conspiracy beginning on R. Page 1708.

[11] *Marcante v. U. S.*, (10 Cir.) 49 F. (2d) 156; c/f U. S. v. McConnell (D. C. 285 F. 164, 165; *Tinsley v. U. S.*, (8 Cir.) 43 F. (2d) 890; *Linde, et al. v. U. S.*, (8 Cir.) 13 F. (2d) 59, 61.

The Government contended that it had proven the general comprehensive conspiracy by circumstantial evidence, consisting of the proof showing that the defendants called upon the purchasers of the land (sometimes separately and sometimes in groups of two or more) in an effort to induce a purchaser, who had already purchased land, to make additional purchases by pretending to be interested in purchasing the holdings at a profit.[11a] Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of an appellate court to reverse the judgment of conviction.[12] We submit that the evidence in this case does not exclude every reasonable hypothesis that petitioner was a member of the general conspiracy charged. Even in those cases where other defendants sought to sell a purchaser more land it is a fair inference they did so on their own account by obtaining the information that the purchaser had already purchased some land from the public records, or two of the defendants may have independently conspired to defraud the purchaser without the knowledge of petitioner, or petitioner and another could have so conspired without the knowledge of the others. Unless they were connected up with the general scheme they should not have been convicted under this indictment.

It is to be noted that the Circuit Court on page 12 of its opinion states specifically that as to *all* the defendants *but petitioner* the record leaves no doubt that they formed

---

11a This is sometimes termed "loading and reloading".

12 *Wright v. U. S.*, (8 Cir.) 227 F. 855, 857; *Turinetti v. U. S.*, (8 Cir.) 2 F. (2d) 15, 17; *Edwards v. U. S.*, (8 Cir.) 7 F. (2d) 357, 360; *Ridneur v. U. S.*, (3 Cir.) 14 F. (2d) 888, 892, and cases cited on p. 893; *Haning v. U. S.*, (8 Cir.) 21 F. (2d) 508, 510; *Siden v. U. S.*, (8 Cir.) 9 F. (2d) 241, 244; *Tinsley v. U. S.*, (8 Cir.) 43 F. (2d) 890, 897, 898.

one conspiracy. That court evidently reached such conclusion after consideration of the record and an examination of a chart of the testimony of the witnesses made part of petitioner's brief in that court.[13] The chart graphically illustrates that out of twenty-five conspiracies proven, petitioner had no part in sixteen of them; in the remaining nine, he is shown only to have been connected with a few of the other defendants in four instances; as to one of the defendants, Baker, the key or pivot man, the Circuit Court recognized that there is evidence that petitioner dealt at arms length with him.

In applying the *Berger* case[15] the Circuit Court failed to take into consideration the fact that the indictment here was in seven counts charging a substantive offense[16] instead of on one conspiracy count as in the *Berger* case. If petitioner was not shown to be actually a part of the general scheme or conspiracy on any one count it was improper to impute to him the mailing, which is the gist of the offense, no matter how closely connected the separate conspiracy referred to by the Circuit Court was to the general conspiracy. The mailing is jurisdictional.[19]

In sixteen instances the proof of separate conspiracies were improperly imputed to petitioner, and *a fortiori* all mailings connected with such conspiracies. The nine instances implicating petitioner as shown on the chart consist of some cases where petitioner made sales to the

---

[13] A similar chart is reproduced in the Appendix to this petition.
[15] Holding that even if there was a variance that it was not prejudicial, and did not affect petitioner's substantial rights.
[16] However, the law relating to conspiracy governed the evidence and procedure.
[19] A scheme to defraud minus the mailing would constitute no offense under the federal statutes; hence, the mailing is jurisdictional.

persons to be defrauded, and in which thereafter other defendants, *at later dates*, independently of petitioner, made similar sales, but in several instances of the nine, petitioner was shown to have acted in cooperation with a few of the other defendants.[20] These facts show a prejudicial variance by the very nature of the confused state of such a record.[21]

In the *Kotteakos* case, this court said that it was one thing to hold harmless the admission of evidence which took place in the *Berger* case where only two conspiracies were proven involving four persons, but an entirely different thing to apply the same rule where there were many conspiracies and many defendants. In our case, of course, there were twenty-five separate conspiracies involving fourteen defendants, out of which nine were ultimately brought to trial and convicted.[22] The evidence involving the acts of the others was offered on the trial of the case and the court charged and the prosecuting attorney argued that all of the acts and statements of the co-defendants whether on trial or not were to be imputed to petitioner.

---

[20] See footnote to the Chart in the Appendix.

[21] Petitioner was forced into the kind of mass trial condemned in the *Kotteakos* case where he did not, by any acts of his own, invite or deserve such a trial.

[22] None were acquitted. The other defendants either died or were granted severances. This was a most involved fraud case lasting about two weeks, including night sessions. It was not a simple case like the *Berger* case, supra, and was much more involved than the *Kotteakos* case appeared to be. The Circuit Court points out the damaging character of the evidence which if wrongly imputed to a petitioner would necessarily affect his substantial rights as follows:

"They point particularly to the damaging character of the proof presenting a record of despicable meanness, of trickery, artifice and fraud, portraying some of the defendants as common swindlers, their activities directed to stripping to the point of impoverishment the old, the helpless, and the ignorant."

As pointed out by this court in the *Kotteakos* case the sheer difference in numbers, both of defendants and of conspiracies proven distinguishes the situation from the *Berger* case, *supra;* obviously the burden of defense to a defendant connected with one or a few of so many distinct transactions is vastly different not only in preparation for trial, but also in looking out for and securing full safeguards against evidence affecting other defendants, to prevent its transference as "harmless error" or by psychological effect, in spite of instructions for keeping separate transactions separate.

It appears that where, as in our case, jurisdiction is based solely on the use of the mails, that a fraud conspiracy should be held within narrow limits to carefully maintain jurisdictional bounds, remembering always that the use of the mails is the gist of the offense.

The charge of the court made no attempt to keep the conspiracies separate nor even to keep separate the individual counts. The court charged that petitioner was responsible for the acts of the co-defendants if the jury found that any *two* or more defendants entered into an agreement to accomplish an unlawful purpose, from which abstract charge the jury could not have possibly understood the concept of "general conspiracy" as defined by this court in the *Kotteakos* case, (R. 1708). The same type of charge was given as to the mailing. (R. 1733.)

Thus it is again seen that even as to the mailing no attempt was made to keep the conspiracy separate, nor even to keep separate the counts, each of which charged a

separate use of the mails in a separate conspiracy. It appears that this case is even more aggravated than the *Kotteakos* case. Here petitioner is charged in a scheme to defraud by use of the mails, and out of twenty-five conspiracies proved petitioner admittedly had no part in sixteen of them. It would thus seem that the result is tantamount to convicting petitioner, not solely for what the evidence showed he was guilty of, but for offenses committed independently by others as well.[23] As this court further held in that case, the inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error, it is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. It thus could not be fairly argued that the evidence in the sixteen instances of fraud irrelevant to petitioner did not influence the result, particularly in view of the court's charge that he was bound by what other defendants said or did where two or more persons conspired (R. 1708). Even if he were not in the general conspiracy, he was, under this indictment and the theory of the District Court, improperly held responsible for all mailings whether the proof showed that he was a part of the conspiracy on that specific count or not. See court's charge (R. 1733).

The Circuit Court seeks to distinguish the *Kotteakos* case on the ground that the variance claimed there was

[23] In the *Kotteakos* case the maximum sentence for a conspiracy was 2 years and the defendants were given 13 months—less than the maximum. For violating the Mail Fraud Statute 5 years is the maximum, but petitioner was given 6 years. The one year extra on imputed guilt emphasizes the danger of applying the harmless error statute to a multi-count conspiracy indictment on the theory that a defendant, though not a party to the general conspiracy, is a party to a smaller conspiracy which is closely connected.

conceded, and that there were many wholly unrelated separate conspiracies shown. There was nothing in the Government's brief filed below in reply to the chart reproduced in the Appendix demonstrating conclusively that petitioner was not implicated in sixteen separate conspiracies proved by the Government. *As this was not controverted, we take it that the Government did concede that as to petitioner, at least, those sixteen acts were wholly unrelated, separate conspiracies, and that petitioner had no part in them. Yet he was held responsible for them, at least on the alternative finding of the Circuit Court, on the theory that those separate conspiracies are closely connected.*

The Circuit Court found that petitioner was not an agent of Baker, but a collaborator with him.[24] The record shows, on the Government's own evidence,[25] that petitioner purchased the land which he sold from Baker, paying cash. Baker forwarded the deeds which he sold petitioner to a bank, sight draft for the purchase price attached. That evidence appears upon the face of the indictment itself. (Examine the indictment letters, Count One (R. 19) and Count Two (R. 21). It is true that in one instance

---

[24] The Circuit Court conceding that petitioner was not part of the general conspiracy, used this language, "As to *all* the defendants but Silverman [petitioner] the record leaves in no doubt that they formed one wolf pack. * * * As to Silverman, on the record perhaps the chief rascal of them all, there is evidence tending to show that he was not an agent of Baker but a collaborator with him, and as to some of the actions, there is evidence giving an appearance of their dealing with each other at arms length." Quere; since the court excepted petitioner from the "wolf pack", (general conspiracy) was it because the court could not from the record fairly include him in the general conspiracy that he was characterized as the chief rascal of them all?

[25] Petitioner offered no evidence at the close of the Government's case, but relied on his defense that he was not a party to the comprehensive conspiracy as laid in the indictment. His motion for directed verdict on this ground was denied.

petitioner was with Baker in some dealings with Mrs. Carter (R. 356)[26] but we submit that there is nothing in that testimony to show that Baker was collaborating with petitioner in a comprehensive conspiracy. Even all of this would fall far short of making petitioner responsible for the separate acts and conspiracies of other persons who may have separately conspired with Baker.

Count Four (R. 28) shows the mailing on June 27, 1940, of a check by a bank, which check is made payable to a co-defendant Diaz, for land which he sold to Fowler in 1940. There is no showing that petitioner even knew that Diaz made this sale or received this money. Petitioner individually last had dealings with Fowler in July, 1938, (R. 1194), yet he is held responsible for a mailing not involving him, on a separate transaction occurring two years later on the theory that he is a co-conspirator. Like the *Kotteakos* case, this view embodied throughout the instructions obviously confuses the common purpose of a single enterprise with the several purposes of numerous separate adventures of like character.

No instructions were given that the jury should take care to consider the evidence relating to each conspiracy separately from that relating to each other conspiracy. It was not sufficient that the court caution the jury, as it

[26] This is the only evidence in the record that we can find that would in any manner justify the court's statement that petitioner was a collaborator of Baker. Everything else shows that they dealt at arms length. That evidence merely shows that Baker and petitioner and Kahn visited Mrs. Carter together in the year 1937. The record shows that Baker made monthly payments to Mrs. Carter over a long period of time. Mrs. Carter had dealt with petitioner on oil royalty transactions and it could be fairly assumed that petitioner induced Baker to assist Mrs. Carter in recouping some of her losses. (R. 356.)

did in this case, to consider each defendant's case separately and to determine his participation in the scheme charged. It obviously does not and could not go to keeping distinct conspiracies distinct, in view of the theory of the case as laid in the indictment, as charged by the court, and argued to the jury by the District Attorney, and, of course, all of this also went to the essential proof of mailing. The jury understood that if any *two* or more persons conspired together the defendants could be convicted. Concededly the evidence showed that much—the challenge here, however, is that it showed separate group instances of this.

The Circuit Court held squarely that this case is governed by the *Berger* case and not the *Kotteakos* case. Of course, if petitioner was a member of the general conspiracy, a reference to those cases was irrelevant. It was only because the court had a doubt about petitioner's connection that it found it necessary to discuss the cases at all. In comparing the *Berger* with the *Kotteakos* case, this court in the latter case stated that obviously a much greater stretch of the imagination is needed to regard an indictment charging thirty-six people with conspiring together, than was needed to say that one charging four as agreeing with each other in terms covering each of two agreements by three or four, one conspirator being different in each proved offense. And even more would be needed to look upon the former as charging eight or more conspiracies than upon the latter as indicting for two. In petitioner's case the situation is even more aggravated with twenty-five separate conspiracies involving fourteen co-conspirators. This court in no uncertain terms has proscribed the heretofore all too prevalent practice of

conducting mass trials wherein a great number of persons are charged as co-conspirators though having no connection with one another, in separate conspiracies, and pointed out that: "Numbers are vitally important in trials, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies." This court then pointed out that when many conspired that they invite mass trial by their conduct, but that wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group. The court went on further to say:

> "Criminals they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

II. In Upholding the District Court's Charge Concerning Reasonable Doubt and the Presumption of Innocence, viz: (a) That the Presumption of Innocence Does Not Apply to a Defendant who is in fact Guilty so that He May Escape Just Punishment; (b) That said Presumption becomes Inapplicable as soon as Prima Facie Evidence of the Truth of the Charges is Presented to the Jury; (c) That said Presumption is No Evidence At All and Plays Its Part Only So Long as there is Absence of Legal Evidence as to the Particular Fact to be Established; (d) That Reasonable Doubt is a Doubt for which a Reason may be Given; the Circuit Court has Decided an Important Question of Federal Law Probably in Conflict with Applicable Decisions of other Circuit Courts of Appeal and of this Court.

Preliminary Statement.

The court charged the jury concerning the presumption of innocence as follows (R. 1703):

> "The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each of the defendants as stated beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, **it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one WHO IN FACT IS GUILTY, so that he or she may escape just punishment.** The rule is but a humane provision of law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this presumption of innocence, when, once having retired to deliberate upon your verdict, you review, weigh and consider the

whole body of the evidence. As I have stated, the burden rests upon the government, remember, to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. **But this presumption of innocence will avail the defendants no further, so soon as prima facie evidence, of the truth of the charges laid against them in the indictment is presented to the jury. That prima facie evidence, if it satisfies the jury, beyond a reasonable doubt, of the guilt of the defendants bars the presumption of innocence, BECAUSE THE PRESUMPTION IS NO EVIDENCE AT ALL, AND PLAYS ITS PART ONLY SO LONG AS THERE IS ABSENCE OF LEGAL EVIDENCE AS TO THE PARTICULAR FACT TO BE ESTABLISHED. If such prima facie evidence, which so brushes aside the presumption of innocence when found worthy of belief by the jury, is not met by the defendants' opposing satisfactory evidence, then that simple prima facie evidence, if it convinces you gentlemen of the jury, as the final judges of the fact, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilty as charged."** (Emphasis supplied.)[27]

That charge must be considered in connection with the Court's definition of reasonable doubt as given to the jury.

---

[27] In *Gomila v. U. S.*, (5 Cir.) 146 F. (2d) 372, this identical charge read from the same manuscript by the same Trial Judge was by this same Circuit Court held to be reversible error, even in the absence of a particularizing exception.

See *Coffin v. U. S.*, 156 U. S. 432, 458-462, holding it reversible error for Court to refuse to charge that the presumption of innocence was evidence in defendant's favor to be considered along with evidence offered by the prosecution. A careful analysis of the history and philosophy justifying this basic rule will be found in that case. Per contra; the Court in this case charged that presumption was not evidence and was brushed aside when prima facie evidence was offered by the Government.

Ezzard v. U. S., (8 Cir.) 7 F. (2d) 808, 811, and *McAdams v. U. S.*, (8 Cir.) 74 F. (2d) 37, 40, holds it reversible error to charge that the "prima facie rule" applies in a criminal case.

The Court, in part, defined reasonable doubt in the following language (R. 1716):

> "Now with reference to 'reasonable doubt'. **Reasonable doubt is a doubt for which a reason may be given.** A doubt growing out of the evidence and the circumstances of the case; it is an honest substantial misgiving as to the existence of a fact, generated or born out of an insufficiency of proof to establish a fact."

Circuit Court Erred in Stating Trial Court Corrected Errors in Charge.

The Circuit Court erred in stating that the trial Court corrected the error in the charge. Perhaps that statement has reference to (R. 1723) where counsel for one of the defendants raised a question relative to the court's statement that proof of guilt should be made by *prima facie* evidence, at which time the court added a statement that the *prima facie* evidence must be established beyond a reasonable doubt to warrant a verdict of guilty.

Argument.

It is improper for the court to speak of proving guilt in a criminal case by "simple *prima facie* evidence" [28] even when there is added the requirement that the proof be beyond a reasonable doubt, and such a statement falls far short of correcting the statement that restricts the rule of presumption of innocence to innocent persons only, and

[28] "Simple prima facie evidence", a highly technical legal term, was not defined and a lay jury could hardly be expected to appreciate its legal significance.

tells the jury that it does not extend to persons who are in fact guilty. Guilty of what? A layman would be justified in believing that if the defendant was guilty of any crime regardless of the nature of the charge that the rule would not apply. It likewise falls far short of correcting the charge that "the presumption of innocence is no evidence at all"; that simple *prima facie* evidence brushes it aside.

We think it would make no difference how many times a judge gave the abstract, orthodox form of instructions when he so qualifies the instruction by telling the jury specifically that the presumption of innocence is "no evidence at all" and that it "does not extend to a person who is in fact guilty". By such statements the whole trial becomes tainted; the traditional method of arriving at a just verdict in a criminal case fails. The court never at any time told the jury to disregard his erroneous statement relative to the presumption of innocence not extending to a person who is in fact guilty, and that it was brushed aside by *prima facie* evidence, and that the presumption was no evidence at all.

This Court, in Coffin v. U. S., 156 U. S. 432, 458-462, Differentiates Between "Reasonable Doubt" and "Presumption of Innocence" Rule. The Presumption of Innocence is Evidence.

Mr. Justice White in a most scholarly discussion of the "presumption of innocence" doctrine in *Coffin* case *supra*, pointed out that the presumption is an instrument of proof created by law in favor of one accused, whereby his innocence is established until sufficient evidence is intro-

duced to overcome the proof which the law has created. In short that the rule of presumption of innocence is evidence. The court said:

> "This presumption on the one hand, supplemented by any other evidence he [the accused] may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn."
>
> "Greenlief thus states the doctrine: 'As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, **as matter of evidence, to the benefit of which the party is entitled.** (Emphasis by the court.)
>
> "This presumption is in the nature of evidence in his favor [i. e., in favor of the accused], and a knowledge of it should be cummunicated to the jury."
>
> "* * * presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt makes more apparent the correctness of

> these views and indicate the necessity of enforcing the one, in order that the other may continue to exist."

Therefore, when the court instructed the jury that the "presumption of innocence was no evidence at all" it excluded an important element of proof, and this likewise was recognized in the *Coffin* case, *supra.*

Here the court even went further than in the *Coffin* case for there, as the opinion will show, the Court fully and correctly instructed on reasonable doubt, but not so in our case, as we shall attempt to show hereafter.

It was also basic error for the court to instruct that the "*prima facie* rule" applied, and that basic error was magnified by the added statement that "simple *prima facie* evidence brushes aside the presumption of innocence when found worthy of belief by the jury".

In civil cases presumptions may sometimes fix the *onus probandi,* but not so in criminal on the main issue. There, the burden and quantum of proof to establish the *corpus delicti* and defendant's guilt never shifts,[29] and a *prima facie* case is unknown in criminal procedure,[30] and in no condition of the proof is it permissible to instruct a jury that it had become the duty of defendant to establish his innocence to obtain an acquittal. The fact of his innocence might arise from the evidence established by law—the presumption of innocence—or by evidence of good char-

---

[29] *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266, 267; *Davis v. U. S.*, 160 U. S. 469, 487.

[30] *Ezzard v. U. S.*, (8 Cir.) 7 F. (2d) 808, 811; *McAdams v. U. S.*, (8 Cir.) 74 F. (2d) 37, 40.

acter, or the unsatisfactory nature of the proof offered by the Government when considered together with the presumption of innocence evidence.

It was gross, basic and fundamental error for the court to deprive petitioner of this most important right to a fair trial.

Erroneous Instruction on Presumption of Innocence Aggravated When Coupled With Erroneous Instruction Defining Reasonable Doubt as Being "A Doubt For Which A Reason Can Be Given".

We submit that this error is aggravated when it is coupled with an erroneous instruction defining reasonable doubt, and that it was error to charge that reasonable doubt is *"a doubt for which a reason may be given."* (R. 1716.)

That form of instruction has been the subject of continuous challenge in the jurisprudence of the Federal Court, as well as that of the State Courts. As far back as 1912, the Circuit Court of Appeals for the 8th Circuit [31] reversed a conviction because the Court disapproved such a charge, which required a juror to give a reason for his doubt before he could acquit a defendant.

The basis of the court's finding was that, if each juror was required to give a reason for his acquittal and for his doubt, he must give a sound reason based on the evidence or want of it. The question then arises as to whether or not this sound reason must be sound in his own mind

[31] *Pettine v. Territory of New Mexico*, (C. C. A. 8) 201 F. 489, 495.

only, or, in the opinion of his fellow jurors, or of the judge; that the ability to give sound reasons for their doubts or beliefs is not given to many men, as it is a matter of common knowledge that in the important affairs of men, doubts for which he can formulate no convincing reason, often induces him to act or to refuse to act. That to require any person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the evidence or lack of evidence and the circumstances of the case for his doubt of his guilt before he may vote for his acquittal, places too heavy a burden on the accused. It destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it.

It was pointed out in other cases that a doubt arising out of evidence is a mental operation for which it may often be very difficult and indeed impossible to assign any reason and yet, if honestly entertained by the jury in a criminal case, must be acted upon because they are only authorized to bring in a verdict of guilty when they are satisfied and convinced beyond a reasonable doubt of the guilt of the accused.

In other cases, it was said that where the jurors were required to assign a reason in the mind (a mental process), such would be quite different from expressing a reason, the latter of which may be beyond the ability of many men, but even that form of instruction was disapproved.

We are citing below all of the Federal cases on this point that our research has disclosed.[32] Some of the Circuit Courts have reversed convictions holding this charge constituted prejudicial error; others disapproved the charge but held that the accused was not prejudiced, thus establishing a definite conflict in the federal jurisprudence on an important question in the administration of Federal Criminal Procedure, which, as far as we have been able to find, has not been, but should be, resolved by this court.[32a]

It is true that no exception was taken to this charge, but the Fifth Circuit Court heretofore has regarded a proper instruction on "reasonable doubt" as so sacramental that it *ex proprio motu* reversed a conviction in *Lambert v. U. S.*, (C. C. A. 5) 101 F. (2d) 961, 964, because of an erroneous instruction on "reasonable doubt", *although, according to the dissenting opinion, p. 967 id., no objection, exception, assignment of error, nor even argument, either oral or in brief, was presented to the court.* C/f *Ward v. U. S.*, (C. C. A. 5) 96 F. (2d) 189, 192. The right of the appellate court to correct basic error in the absence of an exception is well settled.[32b]

It appears that the trial court went entirely too far in giving both of the instructions mentioned above, in an attempt to limit and restrict the scope of the rules relative

---

[32] *Pettine v. Territory of New Mexico*, (8 Cir.) 201 F. 489, 495; *Owen v. U. S.*, (9 Cir.) 130 F. 279, 283 (citing cases from State Courts); *Ayer v. Territory of New Mexico*, (8 Cir.) 201 F. 497; *U. S. v. Wood* (2 Cir.) 66 F. (2d) 262, 265; *Griggs v. U. S.*, (9 Cir.) 158 F. 572, 578; *Murphy v. U. S.*, (3 Cir.) 33 F. (2d) 896; 23 C. J. S. Sec. 1280, 1268; *Mansfield v. U. S.*, (8 Cir.) 76 F. (2d) 224.

[32a] Note that the Circuit Court expressed a doubt that such a charge was improper in this case.

[32b] *Brasfield v. U. S.*, 272 U. S. 448, 450; *U. S. v. Atkinson*, 297 U. S. 157, 160; *Gomila v. U. S.*, (5 Cir.) 146 F. (2d) 372.

to "reasonable doubt" and "presumption of innocence". It was said in the *Pettine* case, *supra*, that in the trial of an important case it is unwise to depart from established and approved definitions to doubtful declarations and novel theories.[33] Or, as it was expressed in *Paddock v. U. S.*, (C. C. A. 9) 79 F. (2d) 872, 877, the Court, in discussing the doctrine of "reasonable doubt" said:

> "We are inclined to agree with the statement of Justice McFarland, speaking for the Supreme Court of California in People v. Paulsell, 115 Cal. 6, 46 P. 734: 'If experimental departures from the well established language sanctioned by all Courts upon the subject of reasonable doubt are to be here allowed, and each trial Court is to venture upon unusual language to express the idea contained in language so often approved, we will be afloat upon a new and unknown sea, and complications will arise in every criminal case coming here which will be very difficult to unravel."

III. In Overruling the Claim that the District Court Erred in Refusing to Charge the Jury that the Failure of the Petitioner to Testify Should Not Create a Presumption Against Him, and Should Not Be Used in the Discussions or the Deliberations of the Jury, Until the Jury Had Deliberated About Six Hours, the Circuit Court of Appeals has Decided a Federal Question Involving a Congressional Command or Policy Probably in Conflict with a Decision of this Court, to-wit: Bruno v. U. S., 308 U. S. 287.

---

[33] In the case at bar none of the defendants testified or offered any evidence in the case, preferring to stand on the legal proposition that no comprehensive or general conspiracy had been proven. How could the jury be expected to formulate a reason and express it when the defense offered no evidence at all?

Preliminary Statement.

Petitioner steadfastly contended, first on demurrer to the indictment, and again and again on objections to evidence from time to time throughout the trial, and then on motion for directed verdict, and finally on appeal to the Circuit Court that he was not a party to the comprehensive conspiracy as laid in the indictment. He made no defense relative to the misrepresentations nor to the fraudulent scheme *vel non*. The only controverted factual issue before the court was whether petitioner was a member of the so-called alleged *"general scheme"*.

Petitioner, believing that the Government had failed to prove that he was a member of the *"general scheme"* or conspiracy did not testify, nor did he offer any evidence whatsoever, but elected to stand on that legal defense.[34] Counsel for petitioner requested the instructions relative to the defendant's failure to testify that this court has held he was entitled to have. *Bruno v. U. S.*, 308 U. S. 287. The court, in the presence of the jury, refused to give the instructions, adding, "It is refused for I think it is elementary."[35] Thereupon, a bill of exceptions was reserved. (R. 1725.)

After the jury had deliberated for six hours, they returned to ask for instructions on another matter (R. 1731). Those instructions showed that, as to several defendants, the jurors had made up their minds and found them all

---

[34] All other co-defendants followed the same course. No evidence of any kind was proffered by petitioner or his co-defendants.

[35] Meaning, of course, that it was elementary that petitioner was not entitled to have the jury instructed that they were not to use the fact of the defendants' failure to testify in their deliberations, a most unfortunate and damaging deprivation of a plain right.

guilty. The court, after replying to the jurors' question, did *ex proprio motu* additionally give the instructions to the jury which were held to be essential in the *Bruno* case, *supra*, (R. 1736-1739.)[36]

Argument.

In *Bruno v. U. S.*, 308 U. S. 287, this court unequivocally held that a defendant not taking the witness stand was, as a matter of absolute statutory[37] right, entitled to an instruction that no presumption was created against him because of his failure to testify—and more important still —*the jury should be instructed that this fact should not enter into the discussions or deliberations in any manner.*[38] This court further held that the failure to give such a requested instruction was *presumptively prejudicial requiring a reversal.*

Here the jury heard Counsel for defendant request such an instruction, and heard the Court refuse it, with the comment, "for I think it is elementary" (R. 1726). That jury had a perfect right, under the circumstances, to conclude that the failure of the defendant to testify did create a presumption against him, and undoubtedly did so conclude. That jury deliberated more than six hours before the Court gave the charge that should have properly been given before the jury deliberated for even one instant. It is altogether reasonable to assume that during

[36] The court ultimately charged substantially in the language of the charge approved in the *Bruno* case, *supra*.

[37] 28 U. S. C. A. 632.

[38] The Court gave this part of the instructions 6 hours later. This could not be effective as it already entered into the jury's discussions and deliberations.

that deliberative period of six hours, the fact that the defendant did not testify in his own behalf did illegally enter into the discussions and deliberations of the jury.

It is, indeed, psychologically difficult for the average juror to free his mind of prejudice against a defendant who fails to testify even when properly instructed; it is expecting too much from human nature, and a lay mind to presume that the statute, and the principles announced in the *Bruno* case, *supra*, were not unknowingly violated by the jurors by a discussion, during a long six hours, of the failure of the defendant to testify in his own behalf.

True, the court *belatedly* made a most praiseworthy attempt to correct the serious error that it had fallen into, but the courts have unanimously held that there should be a reversal where the error has been so serious that it likely affected the minds of the jury despite the attempted correction.

In analogous cases, where the admonition to disregard was given by the Court, the Appellate Courts have always insisted that the trial judge take *prompt* action, and in no case of this nature known to us has there been an approval of the action of the Court in attempting to correct a serious error when the correction was not made promptly.

Petitioner's sole defense was that he was not a party to the comprehensive conspiracy as laid in the indictment.[39]

[39] The question of whether this was a comprehensive conspiracy, or merely a series of smaller conspiracies among smaller groups of the defendants, or a series of disconnected acts was submitted to the jury. This is fully discussed under another heading herein.

The refusal of the judge to instruct the jury on the silence of the defendants, in this connection, could have been the decisive factor in the jurors' deliberations, on this, the crucial phase of the case. The later dramatic attempt to correct the error prefaced by a long preliminary discussion of the propriety of petitioner's counsel to request the charge, etc., could only have confused a very tired and worn out jury. Thus, considering the whole case, the error was so serious as to have affected the minds of the jurors.

The Circuit Court opinion, treating this type of error as a mere technical or formal one,[40] is in direct conflict with the important policy found to exist by this court in *Bruno v. U. S.*, 308 U. S. 287, in which this court said: "Is the disregard of the right which Congress gave to Bruno error, the commission of which we may disregard? We hold not * * *." To the argument that the matter was merely a technical error the court said: "Of a very different order of importance is the right of an accused to insist upon a privilege which Congress has given him."

In the *Kotteakos* case, *supra*, in discussing the effect of the harmless error statute (Section 269) this court said: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, *except perhaps when the departure is from a constitutional norm, or A SPECIFIC COMMAND OF CONGRESS.* (Citing Bruno case.)"

---

[40] The court has apparently overlooked the fact that substantial justice is presumed to have been prevented when defendant is deprived of an important right provided for him in a specific Congressional mandate.

The *Bruno* case, *supra*, holds that it is reversible error for the Trial Court to deny any accused a privilege which Congress has allowed him, e. g., that the jury be charged that in *its deliberations it shall not discuss the fact that the defendant did not take the stand, and that his failure to testify shall not create any presumption against him.* This clearly implies that the instruction be given before the jury retires. The accused would not effectively be allowed the right when the instruction is only given six hours after the jury is worn out by long deliberations in a most complicated case; a case which even the Circuit Court alternatively expresses doubt of the correctness of the finding that petitioner was a party to the general conspiracy. Of what benefit is an instruction that the jury is not to use in its deliberations the fact of defendants' failure to testify if the instruction is not given before the jury retires?

The Objection and Bill Was Timely Noted.

Objection and bill of exception to the failure of the court to give this essential charge were timely noted. Petitioner and his counsel were not called upon to do more. *No earthly good came of the charge which told the jury that they were not to consider the defendant's failure to testify in their deliberations after they had done that for six hours.* This important point does not seem to have been considered by the Circuit Court. Nothing could have been gained by an objection to the Judge's belated charge. If an objection had been interposed there is nothing that the court could have corrected, the fundamental error was a *fait accompli;* the damage that had been already done was then irrevocable. It seems to us that it is a fallacy to

base failure to consider this as reversible error on the fact that the defendant did not object twice to this fundamental error of the trial court.

Accused was Entitled to Instructions before Jury Retired.

We submit that this court implied in the *Bruno* case that the defendant who requested the charge was entitled to have it given before the jury retired. *If this be not so, it seems to us that a way is left open to circumvent the clearly announced policy of Congress recognized by this Court in the Bruno case, supra.*

The Circuit Court says that after the jury had been out for several hours it came back into the court to ask a question, the Judge of his own motion stated to the jury that he had been in error in refusing the charge, and that he wished now to correct the error. It is significant that the court did not send for the jury and correct the error, but waited until the jury filed back into the court room at its own request to ask a question, *which question shows that the jury had made up its mind as to some of the defendants, there being question only as to those who were thought by the jury to have committed some acts after the mailing.* See (R. 1732), and only then did the court decide to correct the error.[41] The Circuit Court lays stress on the

[41] We think this is equivalent to instructing the jury only after the court has been informed that they are ready to return a verdict. The record shows the jury propounded this question (R. 1732): "Your Honor: We would like to have further instructions, there being *a transaction* closed, and *some of the defendants* did not know that the mails were being used until after the transaction was completed could *that party* be found guilty, or only those directly participating at the time." This question indicates that as to "some of the defendants" at least the jury had already decided that they were guilty. At any rate, the jury returned almost immediately with its guilty verdict.

fact that the judge, after several hours, gave a full and correct charge on the point, and the defendants neither excepted to its giving, nor asked further instructions. Of course, they did not. Why should they object, if the charge was full and correct and why should they object to his giving it? They were anxious to have the court minimize whatever damage had been done their clients as far as possible, and so they were right in not objecting. It does not logically follow from this that the damage that had already been done when the charge was peremptorily refused in the presence of the jury had been remedied.

The Circuit Court held against our contention that the correction of the error did not remove the effects of the error complained of. The court then speculates that this belated charge might have been of the greatest value to the jury, indeed of far more value than if given as a part of the general charge. We do not think so. We think that, as the stage was then set, it was an inopportune time for the court to call attention to the fact that the defendants had failed to testify. It could only have had the effect of prejudicing, reminding and confusing the mind of the jury. Entirely too much stress, emphasis and confusion was then made of the fact of defendant's failure to testify; it was juggled about too much for the safety of any defendant on trial relying on a strictly legal defense that he was not a part of a complicated conspiracy being then confronted by emotional effects on the jury—a defendant always being at a disadvantage from a prejudicial standpoint in a fraud case, especially when he elects not to testify.

We also submit that the holding of the Circuit Court is in conflict with decisions of this court, and with decisions of other Circuit Courts holding that *the correction of an error must be PROMPT to be effective.* The test of whether an admonition of the court cures an error depends on whether such a fixed impression was made on the minds of the jury by what proceeded, as to influence its verdict.[42]

The holding is particularly in conflict with the *Bruno* and *Kotteakos* cases, which decided that an error which violates a fundamental right (such as a constitutional right); or a specific command of Congress (such as the charge requested and refused in this case) is not to be treated in the same manner as a technical or formal error. This is particularly true as to petitioner where the facts of his guilt as a member of the conspiracy, especially as to the mailing on Count Four which has not been proven by any evidence at all, and where even the Government impliedly conceded that he was not connected with sixteen separate conspiracies which the Government proved in the District Court.

Discussion of the Law Re Effectiveness of Correction of Error by Court's Admonition to Jury.

Hibbard v. U. S., (7 Cir.) 172 F. 66, 71, the judgment was reversed because of remark by the Court to counsel for the accused while cross-examining witness, which remark intimated that letters in possession of accused should

[42] However it is not necessary to resort to this test when there has been a departure from a constitutional norm, or a specific command of Congress. In such a case the error is presumptively prejudicial. *Kotteakos v. U. S., supra.*

be produced; the Circuit Court held this to be in derogation of the constitutional right of the accused to furnish no evidence in aid of the prosecution, and that it was presumptively prejudicial in the inference thus left in the minds of the jurors when the letters were not brought in, citing *McKnight v. U. S.*, (6 Cir.) 115 F. 972, and cases cited therein.[43] *Grantello v. U. S.*, (8 Cir.) 3 F. (2d) 117, 120, 121, was reversed because the Court commented on defendant's failure to testify even though the defendant took the stand, but was only asked his name and no other question.

Test Stated as to When Admonition by Court Cures Error.

Frantz v. U. S., (6 Cir.) 62 F. (2d) 737, 739, held that where Judge erred by showing bias during trial that a charge admonishing jury to disregard this would not operate to remove from the minds of the jurors what had gone before. Likewise, the language in *Pharr v. U. S.*, (6 Cir.) 48 F. (2d) 767, 770, shows that the test of whether the admonition of the Court cures an error depends on whether such a fixed impression was made on the minds of the jury by what preceded as to influence its verdict. Especially analogous to this case is the situation arising when there has been an abuse of argument by counsel. The test is well stated in *Volknor v. U. S.*, (6 Cir.) 13 F. (2d) 594, as follows:

> "Whether there has been a correction of the abuse of argument by a withdrawal of the objectionable

[43] The refusal to give the instruction with the added comment "that it is elementary" was tantamount to a remark in the presence of the jury that a presumption could be indulged in because of defendants' failure to testify.

parts of it depends upon whether on considering the whole case the error appears to have been so serious that it likely affected the minds of the jury despite the attempted correction by counsel or court. Waldron v. Waldron, 156 U. S. 361; Graves v. U. S., 150 U. S. 118; Wilson v. U. S., 149 U. S. 60. It is true that in Chadwick v. U. S., 141 F. 225, Dunlop v. U. S., 165 U. S. 486, and a number of other cases, it has been held that, if an objection is made to an improper argument, and the court sustains the objection,[44] or counsel withdraws the improper remark, the error will generally be deemed to be cured. **If, however, upon a consideration of the whole case, the error appears so egregious as to have affected the minds of the jury, despite the attempted correction, the verdict must be set aside."** (Emphasis supplied.)

Chadwick v. U. S., (5 Cir.) 117 F. (2d) 902, 905, held that improper remark of prosecuting attorney could be cured by a *"prompt instruction"* to the jury to disregard the remark. It is significant that the Court uses the adjective *prompt*. The case of *Barnes v. U. S.*, (8 Cir.) 8 F. (2d) 832, 834, is important as showing a situation wherein the prosecutor only indirectly commented on the failure of the accused to testify by stating that the testimony of the Government witness was not contradicted,[45] the Court *promptly*[46] ruled that such argument was highly improper. Notwithstanding this the Court reversed on the ground that the statement of the prosecutor disqualified the jury.

---

[44] This, of course, implies prompt action by the court in sustaining the objection; in our case, the court overruled the objection.

[45] The only person who could have made the contradiction in the case was the accused as he was the only one present at the occurrence.

[46] Note that the correction must be *"prompt"* to be effective.

Another case where the District Attorney made only an indirect reference to the failure of the defendant to testify is *De Mayo v. U. S.*, (8 Cir.) 32 F. (2d) 472. How the Court must deal with such action to prevent reversible error was stated to be as follows:

> "Such reference is reversible error unless the court sharply, emphatically, and **promptly** [47] advises the jury that the matter was improper and that they should give no consideration thereto. This should be done in unmistakable and positive terms. To that extent at least, if not to a greater extent, counsel should be rebuked. This is one of the most damaging acts on the part of a prosecutor that can be committed in the course of a trial, not only from the standpoint of the defendant, but because of its effect upon the case generally, and should not be condoned. We do not think that the court in this case dealt strongly enough with the situation." [48]

Middleton v. U. S., (8 Cir.) 49 F. (2d) 538, 540, is another case wherein the Appellate Court held that prejudice against the defendant was not removed by withdrawal of certain inadmissible evidence and by instructing the jury to disregard it.[49] For an early case explaining the philosophy and reasons for the passage of the statute [50] which prohibits an unfavorable presumption on the failure

---

[47] Here again note the insistence by the appellate court on *"prompt"* action by the court. It could hardly be said that the court acted promptly in this case. Had the jury not returned for further instruction on a different subject matter it is more than likely that the instruction would not have been given at all.

[48] If such action is so damaging when done by the prosecutors, *a fortiori* it is immeasurably more damaging when done by the judge as the weight of his great influence *ex necessitate rei* affects the minds of the jury.

[49] The defendant was asked about arrests and convictions for misdemeanors.

[50] 28 U. S. C. 632.

of the accused to testify, see *Wilson v. U. S.*, 149 U. S. 60. There are many cases showing instances where the evidence improperly admitted is so prejudicial that even instruction of court to disregard is insufficient to correct error, some of them are as follows: *Lockhart v. U. S.* (9 Cir.) 35 F. (2d) 905, 906; *Looker v. U. S.*, (2 Cir.) 240 F. 932, 935; *Waldron v. Waldron*, 156 U. S. 361, 363; *Throckmorton v. Holt*, 180 U. S. 552.

Résumé.

It is, therefore, clearly evident that the Judge's belated charge did not correct the error complained of under this heading because:

(1) The *Bruno* case, *supra*, held that the defendant was entitled to the charge by Congressional command, and the failure to give it on request was presumptively prejudicial.

(2) The laudible attempt on the part of the trial Judge to correct the error came too late. It has been uniformly held that where serious error had been committed, its correction, to be effective, must be *prompt*.

(3) The circumstances under which this was committed, and the later attempt to correct it created such a fixed impression of the minds of the jury as to influence its verdict.

(4) The error was so serious that it likely affected the minds of the jury, despite the attempted correction by the Court.

(5) It is improper for the jury to even consider the defendant's failure to testify in its discussions or deliberations. The jury in this case were free to do just that for more than six hours, and were thus disqualified psychologically to render a verdict without violating the congressional enactment [51] and the Constitution of the United States.[52]

(6) The jury should not have been permitted to deliberate for one instant without the benefit of the instructions requested under this heading. The *Bruno* case held that this section [51] does not merely legislate against the psychological operation of the jury's mind, but lays down canons of judicial administration for the trial judge, and impliedly directs the judge to guide the jury by indicating the considerations relevant to the verdict on the facts.

This Court further held in the *Bruno* case that this was not a mere "technical error" which appellate court should disregard, but was reversible error which deprived petitioner of a right which Congress gave to him.

---

[51] 28 U. S. C. 632 providing that in the trial "the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such a request shall not create any presumption against him."

[52] The Fifth Amendment providing that "No person . . . shall be compelled in any criminal case to be a witness against himself."

CONCLUSION.

For the foregoing reasons, petitioner, by his counsel, respectfully prays that writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

WARREN O. COLEMAN,
Counsel for Petitioner.

408 Whitney Building,
New Orleans 12, La.

APPENDIX.

Chart of Testimony of Witnesses Showing Transaction on Which No Evidence Was Adduced, Either Direct of Circumstantial, That Petitioner Participated in or Had Knowledge Of.

	Name of Witness	Place Where Sale or First Contact Made	Approximate Date of Sale, or First Contact	Appellants Shown To Be Involved in Making Sale or Sales
1.	Clifton (R. 787)	Jackson, Miss.	Feb. 1941 (R. 788)	Safir, Diaz.
2.	Hershey (R. 804)	Gulfport, Miss.	1937 (R. 812)	Kahn & Levy.
3.	Daigre (R. 815)	Baton Rouge, La.	Spring, 1941 (R. 815)	Kahn & Levy, Bergin, Safir.
4.	Koch (R. 848)	Poplarville, Miss.	Sept. 1938, Ex. 121 (R. 1954)	Kahn & Levy.
5.	Harper (R. 1056)	Meridian, Miss.	May, 1937, Ex. 723 (R. 2054)	Kahn, Levy, Baker, Overgard, Diaz.
6.	Northrop (R. 1092)	New Orleans, La.	Jan. 1941 (R. 1092)	Manzella, Bergin.
7.	Rosmussen (R. 1123)	Roseland, Fla.	May 1941 (R. 1128)	Safir, Kahn, Levy.
8.	Cuccia (R. 1159)	Jefferson Parish, La.	July 1941 (R. 1159)	Kahn, Manzella, Levy.
9.	Bergerie (R. 629)	New Iberia, La.	Spring 1942 (R. 642)	Safir, Diaz, Johnson.
10.	Allen (R. 332)	Pass Christian, Miss.	April 1937, Ex. 140 (R. 1985)	Baker, Kahn, Levy.
11.	Dupre (R. 396)	Slidell, La.	June 1941 (R. 400)	Safir, Levy & Kahn.
12.	Kahlert (R. 464)	New Orleans, La.	Dec. 1941 (R. 480)	Levy, Kahn.
13.	Smith (R. 497)	Hattiesburg, Miss.	May 1938 (R. 513)	Kahn, Levy, Bergin, Bird.
14.	Koenig (R. 531)	Westwego, La.	Jan. 1941 (R. 532)	Safir, Bergin.
15.	LeJeune (R. 553)	New Orleans, La.	Aug. 1940 (R. 561)	Kahn, Levy, Johnson, Diaz, Bergin.
16.	Prejean (R. 596)	Lafayette Parish, La.	Aug. 1939 (R. 606)	Bird, Johnson.

Chart of Testimony of Witnesses Showing Transactions Participated in by Petitioner.*

	Name of Witness	Place Where Sale or First Contact Made	Approximate Date of Sale, or First Contact	Appellants Shown To Be Involved in Making Sale or Sales
1.	Coleman (R. 1422)	New Orleans, La.	March 1938 (R. 1423)	Silverman, Baker, Bird, Diaz & Kiefer.
2.	Carter (R. 356)	Horton, La.	Oct. 1937 (R. 359)	Silverman, Kiefer, Kahn & Baker.
3.	Breisacher (R. 674)	New Orleans, La.	Nov. 1939 (R. 683)	Silverman, Bird, Johnson, Diaz, Safir, Kahn, Levy, Overgard.
4.	Duling (R. 891)	Jackson, Miss.	Apr. 1941 (R. 915)	Silverman, Johnson, Safir, Diaz.
5.	Matthews (R. 964)	New Orleans, La.	Sept. 1940 (R. 966)	Silverman, Safir, Johnson, Diaz, Overgard.
6.	Rowe (R. 996)	Memphis, Tenn.	1938 (R. 997)	Silverman, Diaz, Kiefer.
7.	Borges (R. 1104)	New Orleans, La.	1938 (R. 1105)	Silverman, Kiefer, Diaz.
8.	Fowler (R. 1183)	Pensacola, Fla.	1937 (R. 1186)	Silverman, Baker, Kiefer, Overgard, Diaz, Bergin.
9.	White (R. 1369)	Pensacola, Fla.	1938 (R. 1372)	Silverman, Johnson, Bergin, Diaz, Levy, Kahn, Kiefer.

* The record will show that petitioner did not have anything to do with the transactions of the others except in the cases of Bressacher, when he visited her with defendant, Johnson; Carter, whom he visited at one time with defendants Baker, Keifer (his business partner) and Kahn. There is circumstantial evidence that he collaborated with Johnson in the transaction with Matthews and Duling. There is also some circumstantial evidence of a connection with Diaz in the Rowe, Borges and Duling transactions and with Bird in the Coleman transactions. Many of the defendants named above visited the "person to be defrauded" as late as one or two years after petitioner made the sales, and petitioner had no knowledge of their transactions.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 485

NATHAN SILVERMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

SUPPLEMENTAL BRIEF OF NATHAN SILVERMAN, PETITIONER, IN REPLY TO OPPOSITION BRIEF OF THE UNITED STATES.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

While we believe that the arguments advanced by respondent in the brief in opposition have been fully and sufficiently covered in arguments contained in the original petition filed, we feel that there are numerous omissions and serious inaccuracies in respondent's brief, but lack of time will permit us to comment on some of those that we think should be called to this Court's attention, as follows:

Respondent's Tables v. Petitioner's Charts of Testimony

In an effort to overcome the force and effect of the "Chart of the testimony of the witnesses" (Appendix Pet.

pp. 47 and 48), respondent has created tables (Res. Br. pp. 46-48). We submit that these are misleading insofar as they are sought to be applied to this individual petitioner. While respondent has not specifically commented upon the chart contained in our petition, but endeavors to demolish it by the substitution of one that does not reflect the true state of the record, the fact remains that as shown by the chart on pp. 47 and 48 of the petition, that petitioner has been convicted in a mass trial where sixteen investor witnesses did not involve this petitioner in any manner, shape or form, and of the nine cases in which the investor witnesses did involve this petitioner, most of the transactions were individual transactions. The substitution of a chart by respondent impliedly admits the correctness of this.

Duling Transaction Shows That There Was No General Conspiracy

The respondent shows an instance on page 16, et seq., of the petition of the case of Miss Lorena Duling, which instance we contend bears out the contention that we made that this petitioner was not involved in any general scheme. The property that he sold Miss Duling was property that he personally purchased from the Plaquemines Land Company; that he was acting strictly on his own account, and any conspiracy that might be inferred from the transaction would be a conspiracy simply between him, Johnson and Diaz. An important omission that shows that Safir was no part of this transaction is the fact that Safir, who later sold this witness land, told her he had seen Diaz and Silverman talking together, which was in conflict with a statement of Diaz that he did not know Silverman—showing that he was not working with petitioner.

That petitioner purchased this land from the Plaquemines Land Co. for cash (sight draft was attached, the

deed being mailed to the bank) appears from the face of the indictment itself. (See indictment letters set forth) (R. 19, 21).

Petitioner Had No Connection With Plaquemines Land Co. Except to Purchase Land From It for Cash

On Page 7 of the petition the general statement is made that "many of the activities were carried on from the ostensible real estate office maintained under the name of Kiefer & Silverman of New Orleans in which many of the petitioners were seen and business of the company transacted" (R. 1033-42). The footnote refers to the testimony of the secretary that she came to know various defendants. The record does not show that Kiefer & Silverman were operating a real estate office; they were operating a stock and bond business and were listed with the Security & Exchange Commission. Nor does the record show that the defendants named in the footnote were connected with Silverman, e. g. (R. 36), the witness was asked where did she see Kahn, and she answered, on Union Street near the front door of the office of Kiefer & Silverman. A reading of those pages of the record will show the true situation, which, we submit, is not that which is broadly stated in the petition. The record does not show the general situation outlined at the beginning of the last paragraph of page 35 of respondent's petition, described as a concerted plotting and conniving in the sense that all of the defendants were working together. The record does not show that petitioner was a member of a general conspiracy or combination which operated in "wolf packs" against various investors at various times. As to petitioner, this broad assertion is certainly contrary to the finding of the Circuit Court. Moreover, we desire to emphasize a serious error made by the respondent in quoting on page 35 the finding

of the court that "the record leaves in no doubt that they formed one wolf pack," etc. It is significant that respondent omitted to quote the statement of the Circuit Court which just proceeded that quoted section, which read "As to *All* the Defendants *But Silverman* the Record Leaves in no Doubt they Formed one Wolf Pack." This is quite a different story, but in a mass trial such as this the identity of an individual defendant even by experienced government counsel as this omission illustrates, is likely to be lost, overlooked and his connection with the case misconstrued.

Respondent Fails to Reply to Contention That When Defendant Is Deprived of a Right Granted to Him by a Specific Command of Congress, This Is Reversible Error.

We also desire to specifically call the court's attention to the fact that respondent in opposing Point III covered in the petition, pp. 32, et seq., that respondent has been content to rest its case on the quotation from the Circuit Court's opinion wherein the court treated the refusal of the District Judge to charge the jury that the failure of the petitioner to testify should not create a presumption against him, and should not be used in the discussions or deliberations of the jury until the jury had already deliberated about six hours, as being mere technical error. Respondent has made no attempt to reply to the basic contention that when a defendant has been deprived of a right granted him by a specific command of Congress, that such error is presumed to be prejudicial and is reversible error, and this court has so held in *Bruno* v. *U. S.*, 308 U. S. 287. See also to the same effect the holding of this Court in *Koteakos* v. *U. S.*, decided June 10, 1946, Nos. 457 and 458, in which latter case this court specifically pointed out that *the error would not be treated as harmless in a case where the*

court's departure was from a constitutional norm or a specific command of Congress.

On page 19, et seq., of respondent's brief, the charge of the court containing the fundamental errors with reference to the presumption of innocence, reasonable doubt, etc., is quoted. A mere reading of that charge shows such a deprivation of fundamental rights that respondent has made no serious effort to justify the errors, but stands content to rest upon the proposition that this case is such that because of the overwhelming proof of guilt that the Circuit Court properly rejected the objection to this charge raised for the first time on appeal. We submit, that this begs the question. Respondent is confusing the proof of the degree of guilt of the defendant's misrepresentations, "rascality and scoundrelism of the meanest and lowest kind" with the question of whether or not this conviction was legally arrived at, where the indictment charged a conspiracy when, we submit, none existed, and where as to this defendant, the Circuit Court itself had doubt that this defendant was a party to the scheme, because the Circuit Court specifically found that as to all the defendants but Silverman, the record leaves in no doubt that they formed one wolf pack. That finding by the Circuit Court necessarily implies that that Court found a doubt as to Silverman, and the court, recognizing that doubt, stated that if they were mistaken as to Silverman's part in the transaction that his conviction should nevertheless be affirmed because of his close connection with the scheme. Such a finding could certainly not justify the argument presented by respondent on page 23 of its brief, "and so here, in view of the overwhelming proof of guilt, the Circuit Court of Appeals properly rejected petitioner's objection to the charge on the presumption of innocence, raised for the first time on appeal." On the contrary, we submit, that the finding of the Circuit Court does not show overwhelming proof of guilt of this defend-

ant on the essential element of this offense, i. e., whether defendant was a member of the general scheme, and as such chargeable and responsible for what others did, as shown by the chart in our original petition, pp. 47 and 48, showing sixteen irrelevant transactions improperly imputed to Silverman. We submit, that the chart in our Appendix shows the true situation, and that shown in the respondent's chart merely confuses the issue insofar as this petitioner is concerned.

Conclusion

Petitioner by his counsel respectfully prays for the relief sought in the petition filed herein.

Respectfully submitted,

WARREN O. COLEMAN,
Counsel for Petitioner,
408 Whitney Building,
New Orleans 12, Louisiana.

(7224)

INDEX

Subject Index

	Page
Petition for rehearing on denial of petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit	1
Certificate of counsel	3
Brief in support	4
Relative to the Court's admitted erroneous refusal to charge, at the time requested (timely exception being reserved and allowed), that the failure of the defendant to take the stand would not give rise to any presumption against him, and also that such fact should not enter into the discussions or deliberations of the jury in any manner	4
Relative to the erroneous instructions by the Trial Court of law relating to presumption of innocence, and reasonable doubt	7
Relative to the finding that petitioner was a member of the general conspiracy as laid in the indictment	8

List of Authorities Cited

Table of Cases

Berger v. *U. S.*, 295 U. S. 78	10
Brasfield v. *U. S.*, 272 U. S. 448, 450	8
Bruno v. *U. S.*, 300 U. S. 287	2, 4
Coffin v. *U. S.*, 156 U. S. 432, 458-462	7
Ezzard v. *U. S.* (8 Cir.), 7 F. (2d) 808, 811	7
Gomila v. *U. S.* (5 Cir.), 146 F. (2d) 372	7, 8
Kopald-Quinn Co. v. *U. S.*, 101 F. (2d) 635	10
Kotteakos v. *U. S.*, decided June 10, 1946, Nos. 457 and 458	2
Marcante v. *U. S.* (10 Cir.), 49 F. (2d) 156, 157	11
McAdams v. *U. S.* (8 Cir.), 74 F. (2d) 37, 40	7
U. S. v. *Atkinson*, 297 U. S. 157, 160	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 485

NATHAN SILVERMAN,

Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of NATHAN SILVERMAN, for a rehearing is based on the following grounds:

1. This Court erred in upholding the Circuit Court's opinion that the failure to give the charge at the time it was requested to the effect that petitioner's failure to take the stand would not give rise to any presumption against him, and also that such fact should not enter into the discussions or deliberations of the jury in any manner, was

mere technical error. This, we contend, is in direct conflict with the holding of this Court in *Bruno* v. *U. S.*, 308 U. S. 287; c/f *Kotteakos* v. *U. S.*, decided June 10, 1946, Nos. 457 and 458, holding that the error would not be treated as harmless where the failure to charge "was a departure from a constitutional norm *or a specific command of Congress.*"

2. The Court erred in upholding the Circuit Court's finding that the serious errors in the charges relative to the presumption of innocence and reasonable doubt did not do substantial injury to this defendant, in view of the doubt expressed that this petitioner was member of general conspiracy.

3. The Court erred in upholding the Circuit Court's finding that even though this defendant was not a member of "the general conspiracy" his close connection with the other defendants would impute to him all of the acts of the others, and warrant his being placed in a mass trial.

4. Petitioner in order not to burden this petition by repetition, adopts, by reference, the causes for rehearing claimed in the companion petitions in Nos. 484 and 486 insofar as applicable.

WHEREFORE, this petitioner, tending herewith his brief in support of this petition, prays that a rehearing be granted to him.

WARREN O. COLEMAN,
Counsel for Petitioner,
408 Whitney Building,
New Orleans 12, Louisiana.

Certificate of Counsel

I hereby certify (original signed) that the above and foregoing petition for rehearing is filed in good faith, upon real and substantial grounds, and not for mere purpose of delay.

WARREN O. COLEMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT

MAY IT PLEASE THE COURT:

I

Relative to the Court's admitted erroneous Refusal to Charge, at the time requested (timely exception being reserved and allowed), that the failure of the defendant to take the stand would not give rise to any presumption against him, and also that such fact should not enter into the discussions or deliberations of the jury in any manner.

This Court held in *Bruno* v. *U. S.*, 308 U. S. 287, that a defendant who elected not to give testimony in his own defense was entitled, *as a matter of statutory right*, to request an instruction to the effect that: (1) his failure to testify would not give rise to any presumption against him, and (2) *that this fact should not enter into the discussions or deliberations of the jury in any manner.* This Court, after discussing the harmless error statute (Sec. 269), reversed the judgment in the *Bruno* case because this charge was refused. This Court found that to deprive the accused of a right granted by a specific command of Congress was reversible error, stating, "Is the disregard of the right which Congress gave to Bruno error, the commission of which we may disregard? We hold not * * *." To the argument that the matter was merely a technical error this Court said: "Of a very different order of importance is the right of an accused to insist upon a privilege which Congress has given him. In the *Kotteakos* case, *supra*, this Court again emphatically asserted that such an error as complained of here did not come within the purview of Sec. 269 and used this language:

> "If when all is said and done, the conviction is sure that the error did not influence the jury, or had but

very slight effect, the verdict and judgment should stand, *except perhaps when the departure is from a constitutional norm,* OR A SPECIFIC COMMAND OF CONGRESS." (*Citing the Bruno* case, *supra.*)

Perhaps, in an excess of zeal, concerning this legal proposition, we have unduly confused the issue both in the petition to this Court and in the Circuit Court by citing the authorities relating to the correction of mere technical errors—those authorities being to the effect that the correction to be effective must be prompt. We are now convinced that because of such extensive citation of authorities (intended as additional ground) on that proposition the Circuit Court, and this Court, has lost sight of the basic concept that to deprive an accused of a privilege which Congress has given him is *juris et de jure* reversible error.

Certainly, the Circuit Court did not decide the question squarely posited there. That court rested its finding on the alternative proposition raised and found that: "The law is settled that cases are not reversed unless it appears that the error complained of has reasonably prevented substantial justice being done." The Respondent in the opposition brief filed in this Court, was equally disinclined to discuss the real question raised under this heading as Respondent merely quoted excerpts from the finding of the Circuit Court and studiously avoided any mention of the real objection raised. We say that when an accused is deprived of a right granted him by Congress the "substantial justice doctrine" of ignoring error becomes irrelevant. This Court has said that the deprivation of such right is irreparable.

We think that this question is as important in the administration of federal criminal law as was the question in the *Bruno* case, *supra,* and that we should have an opportunity to appear before this Court and argue it.

The doctrine in the *Bruno* and *Kotteakos* cases has been strangely modified and undermined by the finding of the Circuit Court and the Respondent's brief which avoids all reference to the effect of the type of error here complained of. A respect for the fair administration of justice by the profession requires a fair statement of an important point to be openly stated, argued and decided. Such is not the case here. This point was not discussed in either the Circuit Court's opinion or in the reply brief of the Respondent. This Court is entitled to have the Respondent reply to a point of law so clearly and squarely spread on the record.

The parallel between the facts in this case and those in the *Bruno* case is striking. In this case, as in the *Bruno* case, a request to charge was made and refused. In both cases exception was reserved to the refusal to so charge. In this case, the Court decided to tell the jury that "they were not to consider the defendant's failure to testify in their discussions and deliberations" only after that had already been free to so argue to each other for about six hours. It is sought to predicate waiver of the original exception on petitioner's failure to object to this belated giving of the charge. This seems to be pure sophistry. The objection was not to the giving of the belated charge—for what it was worth. The objection was to the refusal to give the charge that this Court, in the *Bruno* case, stated this accused was entitled to have by specific command of Congress. Congress could not have meant that an accused could be refused the right, and the jury allowed to deliberate for six hours and then belatedly given it. He was entitled to the right at the instant that he requested it. If he did not get it then he was deprived of a right given him by a specific command of Congress.

Nor do we think it a sufficient answer to speculate as the Circuit Court has done (the argument being adopted by

Respondent) that the belated giving of the charge might have been of more benefit to the defendants than if given as part of the general charge. If Congress has ordained that an accused was entitled to the charge upon request, and the request was denied, we again come back to the principles of the *Bruno* and *Kotteakos* cases, *supra*, that the accused cannot be deprived of a right granted him by a specific command of Congress. The deprivation of such right cannot properly be rationalized by mere speculation for Congress has not left it to the courts to do so. The policy has been established by Congress. Its mandate is to be followed, and excuses from a deviation therefrom should not be sought for in speculation.

We shall not labor the point further. We think the issue is now unequivocally set forth, and will not be confounded with the authorities relating to correction of error as to matters not at all applicable to "when the departure is from a constitutional norm, or a specific command of Congress."

II

Relative to the erroneous instructions by the Trial Court of law relating to presumption of innocence, and reasonable doubt.

Respondent did not seriously endeavor to uphold the various basic errors committed by the Trial Court in instructions relating to the rule of presumption of innocence.

Respondent could hardly have successfully defended such statements as: that the presumption does not apply to person in fact guilty; that the *prima facie* evidence of the truth of the charges in the indictment is presented to the jury. See *Coffin* v. *U. S.*, 156 U. S. 432, 458-462; *Gomila* v. *U. S.*, (5 Cir.) 146 F. (2d) 372; *Ezzard* v. *U. S.*, (8 Cir.) 7 F. (2d) 808, 811; *McAdams* v. *U. S.*, (8 Cir.) 74 F. (2d) 37, 40.

The statement in the charge that "Reasonable doubt is a doubt for which a reason may be given," although many times held to be erroneous (see authorities cited in footnote 32, p. 31 Silverman pet.) was not discussed at all by Respondent, although a conflict exists in the federal circuit courts concerning whether such charge is so prejudicial as to constitute reversible error.

Concededly, no particularizing objection was made to these errors, and the law is that this Court may disregard them. On the other hand, the errors are so serious, so fundamental and so numerous that a conviction in such a case should not be permitted to stand on a mere technicality. That this Court may consider such errors is likewise well settled (see *Brasfield* v. *U. S.*, 272 U. S. 448, 450; *U. S.* v. *Atkinson,* 297 U. S. 157, 160; *Gomila* v. *U. S.,* (5 Cir.) 146 F. (2d) 372. Nor is the Respondent correct in stating that these errors should not be noticed because the proof of guilt is overwhelming. That the evidence presents facts that would produce strong emotional reaction and prejudice against the defendants tried is undenied, but that all of the evidence should be imputed to the petitioner is open to serious question and even the Circuit Court segregated as to whether he was part of a general conspiracy, and we submit that on that essential element of the offense, there was grave doubt both as to the law and the facts. This, we think, is the kind of case where the Court should exercise its discretion in noticing plain error which appears on the face of the record.

III

Relative to the finding that petitioner was a member of the general conspiracy as laid in the indictment.

This proposition was argued at length in the original petition (page 8, et seq.) and it was shown that in the great majority of transactions imputed to petitioner he had no

part in or knowledge of (see Chart Ap. pet. p. 47, et seq.). Nevertheless, Respondent ignored the fact that the Circuit Court specially segregated petitioner, but on the contrary, argued that the Circuit Court found that (Respondent Br. p. 35):

> "• • • • the record leaves in no doubt that they formed one wolf pack. It shows a concerted, plotting, scheming, and conniving in loading and reloading their victims, a concerted scurring hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan."

We have quoted the Respondent's excerpt from the Circuit Court's finding in order to emphasize that it was not the finding of the Circuit Court as to this petitioner, Silverman.

For emphasis, and so that there can be no misconception as to the legal situation *quo ad* petitioner, Silverman, we requote the finding with the part omitted in Respondent's brief.

> "As to all the defendants *but Silverman* the record leaves in no doubt that they formed one wolf pack. It shows a concerted plotting, scheming, and conniving in loading and reloading their victims, a concerted scurrying hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan."

The court then states that,

> "If we are mistaken in this [including petitioner in a general conspiracy] and there were two conspiracies, one between Baker and the other defendants and another between Silverman [petitioner], Baker and some of them, it is perfectly clear that the conspiracy

> in which Silverman was engaged, if it was a separate conspiracy, was so closely connected with the main, the general conspiracy, as that the variance could not affect and has not affected, his substantial rights, and the principles laid down in Kopald-Quinn Co. *v.* U. S., 101 F. (2d) 633, and Berger *v.* U. S., 295 U. S. 78, controls."

We submit that the Chart (Pet. Br. Ap. 47 et seq.) showing that out of 25 investor witnesses, 16 did not involve him at all, shows, without more, the fallacy of the aforesaid quotation. The principles of the *Berger* case, *supra,* could not possibly be applied to a case of this kind. The *Berger* case involved a few simple transactions among a few persons concerning the same counterfeit money, and could not, by any stretch of the imagination, be made analogous to this case where petitioner merely purchased land from the co-defendant, Baker, and sold it on his own account. He could not know what transactions others may have had with the same land or the same vendor.

We reiterate, the indictment itself shows that petitioner dealt at arms length with Baker the owner of the Plaquemines Land Co. Petitioner purchased land from him at a set price and was required to pay cash in advance. This is shown conclusively by reference to the indictment letters in Count I (R. 19) where the mail fraud count letters show that the deed to certain property purchased by petitioner was sent to a bank with instructions to deliver the deed to petitioner only upon his paying the sum of $112.50, plus bank's handling charges. The bank was instructed to remit this cash to the Plaquemines Land Co. This does not coincide with Respondent's broad assertion of a conspiracy to divide profits, etc. It shows a relationship of merely a buyer and seller of land dealing at arms length, nothing more.

It is the kind of case such as *Marcante* v. *U. S.*, (10 Cir.) 49 F. (2d) 156, 157, in which the Court stated of the government's evidence: "It forged the links but failed to join them in a chain."

Wherefore, petitioner, Nathan Silverman, through his counsel, respectfully prays for a rehearing, and for certiorari, as originally prayed for.

Respectfully submitted,

WARREN O. COLEMAN,
Counsel for Petitioner,
408 Whitney Building,
New Orleans 12, Louisiana.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	5
Argument	18
Conclusion	45
Appendix	50

CITATIONS

Cases:	
Allen v. *United States*, 164 U. S. 492	23
Allis v. *United States*, 155 U. S. 117	23
Beavers v. *Haubert*, 198 U. S. 77	44
Corbett v. *United States*, 89 F. 2d 124	29, 32, 39
Decker v. *United States*, 140 F. 2d 378, certiorari denied, 321 U. S. 792	30, 31
Gomila v. *United States*, 146 F. 2d 372	21
Graham v. *United States*, 120 F. 2d 543	28
Holmgren v. *United States*, 217 U. S. 509	23
Hirabayashi v. *United States*, 320 U. S. 81	37
Johnson v. *United States*, 318 U. S. 189	23
Kann v. *United States*, 323 U. S. 88	28 30, 31
Kotteakos v. *United States*, decided June 10, 1946, Nos. 457 and 458, O. T. 1945	34, 36
Mansfield et al. v. *United States*, 155 F. 2d 952	43
McDonald v. *Hudspeth*, 113 F. 2d 984, certiorari denied, 311 U. S. 683	44
McIntyre v. *United States*, 49 F. 2d 769	38, 39
McNear v. *United States*, 60 F. 2d 861	38, 39
Mitchell v. *United States*, 118 F. 2d 653; 126 F. 2d 550	32, 33
Moody v. *State*, 164 Pac. 676	27
Pasqua v. *United States*, 146 F. 2d 522	22, 23
Savage v. *United States*, 270 Fed. 14, certiorari denied, 257 U. S. 642	30
Securities & Exchange Commission v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344	42
Securities and Exchange Commission v. *Howey*, decided May 7, 1946, No. 843, O. T. 1954	43
Smith v. *United States*, 61 F. 2d 681, certiora i denied, 288 U. S. 608	29

717391—46——1

Cases—Continued Page

Steiner v. *United States*, 134 F. 2d 931, certiorari denied, 319 U. S. 774 39

United States v. *Cohen et al.*, 145 F. 2d 82, certiorari denied, 323 U. S. 799 34

United States v. *Earnhardt*, 153 F. 2d 472, certiorari denied June 3, 1946, No. 1158, O. T. 1945 ..... 34, 43

United States v. *Kenofskey*, 243 U. S. 440 28

United States v. *Leathers*, 135 F. 2d 507 30

United States v. *Weisman*, 83 F. 2d 470, certiorari denied, 299 U. S. 560 29

Statutes:

Sec. 215, Criminal Code (18 U. S. C. 338) 4

Securities Act of 1933 (48 Stat. 74, as amended, 48 Stat. 905):

Sec. 2 (1) (15 U. S. C. 77b (1)) 3

Sec. 17 (a) (15 U. S. C. 77q (a)) 3

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 484

MILLARD C. BAKER, ISADORE WALTER KAHN, BENJAMIN L. LEVY, A. M. SAFIR, WILLIAM B. BIRD, GABRIEL DIAZ, AND EMANUEL M. BURGIN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 485

NATHAN SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 486

RUBEIN V. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 2397–2409) is reported at 156 F. 2d 386.

JURISDICTON

The judgment of the circuit court of appeals was entered July 10, 1946 (R. 2410), and petitions for rehearing were denied August 12, 1946 (R. 2440). The petitions for writs of certiorari were filed September 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury with regard to (a) the presumption of innocence, (b) credibility of witnesses, (c) the failure of petitioners to testify, and (d) the requisite proof of petitioners' connection with the use of the mails.

2. Whether there was adequate proof of the uses of the mails charged, and that the mails were used in furtherance of the scheme to defraud.

3. Whether there was proof of a single scheme to defraud as charged in the indictment.

4. Whether "cash deeds" conveying parcels of land and undivided interests in royalties on aggregated parcels, coupled with collateral agreements and promises as to exploitation operations, are securities within the meaning of the Securities Act of 1933.

5. Whether petitioner Johnson was denied a speedy trial.

STATUTES INVOLVED

The Securities Act of 1933 (48 Stat. 74, as amended, 48 Stat. 905) provides in pertinent part as follows:

> SEC. 2 (1). The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [15 U. S. C. 77b (1).]
>
> SEC. 17 (a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. [15 U. S. C. 77q (a).]

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

A seven-count indictment was returned in the District Court for the Eastern District of Louisiana on September 4, 1942, charging that petitioners and certain others[1] had conceived and executed a scheme to defraud certain named investors in the sale of securities and had used the United States mails in furtherance thereof (R. 2–36). The scheme to defraud is fully set forth in count 1 (R. 3–18) and incorporated by reference in all of the subsequent counts, each of which is predicated on a different mailing. Briefly, the scheme described in count 1 was that petitioners created and controlled the Plaquemines Land Company, which had acquired and owned considerable acreage of unimproved marsh and swamp lands located in Plaquemines and St. Bernard Parishes, Louisiana; that this land was leased to the Gulf Refining Company, giving Gulf the right to explore for oil on such land, with the lessor and lessee sharing the interest in any resulting mineral discovery; that petitioners then, by various fraudulent promises and misrepresentations, sold to various investors small parcels of the land together with fractional undivided interests in the mineral rights in larger tracts under lease to Gulf, the sales being evidenced by

[1] Others named in the indictment as confederates were Frank I. Kiefer, Jr., Henry Manzella, and Harvey M. Overgaard. Overgaard was named but not indicted because of his death prior thereto; defendant Manzella died prior to trial, and defendant Kiefer was in the Army at that time.

so-called "cash deeds", and that in carrying out the scheme, petitioners employed various devices described in the indictment, and more fully described in the discussion of the evidence, *infra*, pp. 9–13.

Petitioners introduced no evidence on their behalf but moved severally for directed verdicts on all counts after the Government had rested (R. 96–130). The attorney for the Government also moved to dismiss counts 6 and 7 because of his inability to prove the use of the mails there charged (R. 1678). The court directed verdicts of not guilty on counts 3, 6, and 7 (R. 1685, 133), and the jury found all the petitioners guilty on counts 1, 2, 4, and 5 (R. 133). Petitioners were given consecutive sentences on counts 4 and 5, aggregating from 5 to 8 years, and a sentence of 5 years each on counts 1 and 2 to run concurrently with each other and with the sentences imposed on count 4 or counts 4 and 5 (R. 171–184). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 2410).

The evidence in support of the convictions may be summarized as follows:

The Plaquemines Land Company was incorporated on March 14, 1911, under the laws of Louisiana and domiciled in the Parish of Orleans (R. 1669; Gov. Ex. 413, R. 2291). The scheme to defraud investors charged in the indictment began in the late 1930's and continued through the early

1940's. Many of the activities were carried on from the ostensible real estate offices maintained under the name of Kiefer and Silverman in New Orleans, in which many of petitioners were seen and business of the company transacted. (R. 1033–1042.)[2] The Plaquemines Land Company had acquired three large parcels of land aggregating over 40,000 acres in St. Bernard and Plaquemines Parishes in Louisiana, all of which was recorded under the name of Plaquemines Land Company. Various parcels of this land had been under mineral lease to the Gulf Refining Company beginning on June 13, 1935. The leases provided that Gulf would retain seven-eighths' interest in any minerals discovered, and that a one-eighth royalty on oil, gas, and other minerals found would go to the lessor in addition to the payment of an annual rental for the exploitation privilege. (R. 1596–1600.)[3] These leases, with one excep-

[2] A secretary employed at these offices testified as to coming to know Silverman, Diaz, Bird, Kaker, Kahn, Manzella, Kiefer, and Overgaard at the offices (R. 1036–1037) and as to the various activities of Plaquemines Land Company engaged in at those offices (R. 1036–1042).

[3] The leases to Gulf are shown in the record as follows:

Gov. Ex. 375, R. 1609, R. 2224–2235, covering St. Bernard Parish Land, dated June 13, 1935, expiring by its terms on June 12, 1940, release being issued by the Gulf company on August 1, 1940; Gov. Ex. 376, R. 1609, 2235–2244, covering St. Bernard Parish land, dated December 23, 1935, expiring for failure to pay rental on December 23, 1939, release being issued by the Gulf company on December 6, 1942; Gov. Ex. 377, R. 1597, 1600, 1609, covering St. Bernard Parish land, dated April 4, 1936, expiring after a ten year period; Gov.

717391—46——2

tion, expired at intervals between December 1939 and May 1941 (R. 1601–1602). In the early part of 1940, petitioner Baker, president of the Plaquemines Land Company, contacted C. A. Lomax, a representative of the Gulf Refining Company, and requested that Gulf not terminate one of the then remaining leases (R. 1603). Mr. Lomax indicated that the company had finished its seismographic record of the land and was not interested in carrying the lease any longer (R. 1604). However, Baker asked Lomax whether he would not be willing to carry the lease on a free basis (R. 1604), telling Lomax that the reason for his request was that he, Baker, had deeds already printed which showed the land being under lease to Gulf (R. 1635). Lomax testified that he declined Baker's proposal because he was not joining any scheme to sell land (R. 1641), although final determination of that question was made by the Houston office of the Gulf company (R. 1642). Lomax further testified that while it was possible that there was oil on the particular lands and that Gulf could be mistaken, nevertheless this would be an "anomaly," and that from their in-

Ex. 378, R. 1609, 2244–2248, covering Plaquemines Parish land, dated April 24, 1936, release being issued by the Gulf company on September 23, 1941; Gov. Exs. 379, 379a, R. 1600, 1601, 2249–2252, covering Plaquemines Parish land, dated February 19, 1937, partial release issued by the Gulf Company on September 23, 1941; Gov. Ex. 380, R. 1600, 1602, 2253–2256, covering Plaquemines Parish land, dated May 26, 1937, expiring for failure to pay rental on May 25, 1941 release being issued by the Gulf company on May 6, 1942.

vestigation of the situation Gulf was satisfied that there was no oil there (R. 1614, 1624–1625).

Because of the size of the record and the number of investor-witnesses, it is impractical, within the limits of this brief, to set forth the details of all of the various sales made in pursuance of the scheme. Therefore, we shall describe the essential aspects of the scheme as generally practiced and illustrate with a few actual instances. The scheme was generally effected as follows:

One of the petitioners would approach an investor, in most cases an aged person and oftimes a woman (see, e. g.,[4] R. 292–293, 356–357, 465–466, 682–683, 965, 997–998, 1092), and offer to sell him or her a few acres, perhaps 5 or 10, of the Plaquemines Parish land. Typical representations made by the salesman to induce a purchase were that the land was in the heart of an area which was being heavily exploited by big oil companies, that Gulf Refining Company had an underlying lease on these very lands and was drilling for oil all around the area, and that, therefore, the investor would be wise to purchase the land which, when oil was discovered, as it undoubtedly would be, would become much more valuable (see, e. g., R. 348, 375, 509, 532, 571,

[4] As to each of the phases of the scheme and practices of petitioners, the record is replete with proof. We have for convenience confined our citation of record references to typical instances.

633, 789, 809, 849, 1067–1068, 1104–1105). In addition, the investor was often told that he would profit substantially on his share of the oil royalties that would be paid on the land, or that if he bought, he would get an oil well (see, e. g., R. 335, 342, 817, 1104–1105, 1136). Other misrepresentations were made, such as that the purchasers could live on the land or farm it (see, e. g., R. 532, 550, 788–789, 999, 1125). Additional sales were made to the same investors by one of several techniques. One device was to precede a second sales proposal with a visit by one of the petitioners, who touted the value of the land and the good sense or fortune of the investor in purchasing these oil properties, or who represented himself to be an agent of some large organization interested in buying large tracts of the land and paying a very substantial price, far above that which the investor had paid for the particular parcels, but stating that the organization would not purchase from the investor unless he had a larger tract to offer. Thereafter, another of the petitioners would call on the investor and offer to sell him additional parcels. The investor would then purchase additional land, but thereafter he would not see the party who had touted the value of the land or had offered to buy a large tract from him. (See, e. g., R. 559–574, 536–538, 805–810, 974–976, 906–922, 1163–1165.) Another technique was for one of the petitioners on the second or third visit to represent himself as an "insider"

in an oil company which was interested in buying up large parcels of the particular land and which would pay a very substantial price for such land. This "insider" would state that he could not go out and buy the land for his own account and resell it to the company because of his affiliation, but would offer to buy parcels of the land for the investor at a low figure and then resell it for the investor to his principal at a much higher figure, provided that he would be given an agreed substantial share (normally 15 or 20%) of the profit on such resale. The investor would then purchase some of the land which the "insider" obtained for him, but it was never resold as promised. (See, e. g., R. 414–415, 498–499, 509–512, 560.) While the foregoing techniques and misrepresentations were the principal ones practiced by the petitioners to sell the land, there were others, which will appear as transactions with some of the investors are detailed.

In effecting the foregoing sales devices, petitioners transacted business with the numerous investors in varying combinations. In every instance, from two to eight of the petitioners would see a particular investor at different times and in varying roles. In one case, a particular petitioner might be the original salesman, another petitioner the "independent purchaser" or touter giving the investor the impression that outsiders were interested in purchasing the land at high

prices, and a third or fourth petitioner would then make a second or subsequent sale. In another transaction petitioners would shift roles and the one who had previously played the part of salesman might become the independent purchaser. The record is replete with evidence showing that each of the petitioners at one time or another worked with most, if not all, of the other petitioners in connection with various sales. It is, of course, impossible within the limitations of this brief to detail the evidence showing these inter-relationships. However, an analysis of the record illustrating these connections is attached as an Appendix.

After the investor had agreed to purchase parcels of the land in Plaquemines Parish, and had given the salesman cash, checks [5] or notes to cover the purchase price, he received a so-called "cash deed" from Plaquemines Land Company as grantor over the signature of Baker as president thereof. The "cash deeds" were all substantially the same, and, in addition to the provisions describing and conveying the parcels sold to the investor, contained, without exception, provisions

---

[5] Many of the checks were made payable to Plaquemines Land Company (see, e. g., Gov. Ex. 84, R. 1874; Gov. Ex. 86, R. 1879; Gov. Ex. 136–137, R. 1977). Those checks made payable to one of the petitioners were, in many instances, endorsed by one or more of the other petitioners (see, e. g., Gov. Ex. 33, R. 1785; Gov. Ex. 80, R. 1868; Gov. Ex. 83, R. 1873; Gov. Ex. 87, R. 1879; Gov. Ex. 89E, R. 1881; Gov. Ex. 94A, R. 1897).

such as the following (Gov. Ex. 20 at R. 1768–1769):

> The vendor hereunder reserves All of the mineral rights on the land herein transferred and in lieu thereof the said Plaquemines Land Company does by these presents grant, bargain, sell, set over, abandon and deliver with full warranty of title unto the purchaser of above described tract of land *An Undivided Prorata Part of All the Mineral Rights on the following described lands (of which the acreage herein transferred forms a part), as the acreage herein transferred bears to the whole.* Said lands being located in Plaquemines Parish in Township 16 South Range 16 East, to-wit: [followed by legal description of the sections subject to a Gulf lease]
>
> Under date of May 26, 1937, the Plaquemines Land Company granted unto and in favor of the Gulf Refining Company a ten year mineral lease covering the 1635 acres above described. Which mineral lease provides for payment to owner or owners thereof as their interest may appear of record of the usual one-eighth royalty on all oil, gas, and other minerals found and saved from said land and for an annual rental of twenty-five cents (25¢) per acre per annum pending drilling. Which mineral lease is recorded C. O. B. 85, folio 65. [Italics supplied.]

In almost every instance, the deed had either already been recorded when it was received by the investor from one of the petitioners person-

ally or by mail, or one of the petitioners assisted the purchaser in accomplishing the recordation (see, e. g., R. 349, 479–480, 790, 833–834, 1378). The deputy clerk of court at Point a la Hache, Louisiana (Plaquemines Parish), testified that it was the practice for Baker to mail or bring the deeds to his office and request him to record them and either return them to Baker or mail them to the indicated grantee (R. 1644). Moreover, each of the cash deeds delivered to the purchasers contained a clause stating that "Internal revenue stamps as required by law have been attached to *recorded* copy and cancelled" [Gov. Ex. 112 at R. 1949; italics supplied].

Transactions with typical individual investors were as follows:

In June 1941, petitioner Safir contacted Andrew E. Dupre, secretary of the New Orleans Athletic Club, for the purpose of selling him some of the Plaquemines land. Safir stated that the land was very valuable, and that drilling for oil would take place in the very near future. He showed Dupre a map and pointed out the Quarantine Bay area, which was near the Plaquemines Parish land, and stated to Dupre that the land he intended to sell him was along that section. He told Dupre that if a large company drilled, Dupre would participate in the proceeds on a per acre pro rata basis. Dupre thereupon purchased five acres at $25 per acre. (R. 397–400.) In August 1941, Dupre purchased an additional five

acres at $25 per acre from Safir (R. 405). Thereafter, in early September 1941, petitioner Kahn called upon Dupre and told him that he had found out from the public records that Dupre had purchased land in Plaquemines Parish and that a friend of his would like to discuss a similar proposition. Petitioners Kahn and Levy talked with Dupre, and Levy asked Dupre if he would be interested in purchasing more of the land at $60 per acre. Levy distinguished his proposition from the previous purchases made from Safir by telling Dupre that he would give Dupre a one-eighth royalty interest, whereas in Safir's sales, Dupre had obtained only a one-sixteenth interest. Levy further told Dupre that he was blocking a large portion of this particular land for the purpose of reselling it to associates in New York City. Dupre then purchased five acres at $60 per acre. (R. 406–410.) Later in the month of September, Kahn and Levy visited Dupre again and persuaded him to purchase five more acres by telling him that there had been a lot of activity in connection with the land and that they wanted to offer him some more of the land which a friend of theirs had purchased but could not pay for (R. 411–412). Subsequently, in September or October 1941, petitioners Levy and Kahn again sold Dupre five additional acres at $60 per acre on the representation that the land would be sold in New York at a very handsome

717391—46——3

profit, and that they would all participate in the profit on the resale (R. 413–415). Notwithstanding these repeated promises that the land would be resold, it never was (R. 417).

Prior to 1941, Rubein Johnson had sold some land in Texas to Miss Lorena Duling, a 78-year-old retired school principal in Jackson, Mississippi. That transaction was not, as she testified, "successful." In January or February of 1941, petitioner Silverman contacted Miss Duling and told her that Johnson was sorry about the Texas transaction and desired to give her five acres of Plaquemines Parish land. The "gift" was made, but three days later Silverman told her that she would have to pay $250, which represented one-half of the purchase price. She made this payment to Silverman, who told her that it was almost a certainty that some large oil concern would extend its holdings to the area close to her five-acre plot, that she would have to have twenty acres in order for her five-acre plot to be valuable, since twenty acres were necessary to have a drilling site, and that there was no doubt at all that within thirty to sixty days her land would be a desirable drilling site. Thereupon, Miss Duling purchased an additional fifteen acres at $90 per acre for a total of $1,350, which she paid in cash to the defendant Silverman. Silverman told her not to sell the land, because he believed that within a few days or weeks it would increase in value very much and that a big oil concern would pay

a good price for the property. He also told her not to sell unless she communicated with him and that he thought she could get as much as $200 an acre. (R. 893–900, 937–940.)

Petitioner Diaz then contacted Miss Duling and told her that he was a field buyer for one of the big companies and that he had found from the public records that she owned oil land. He offered to buy her parcels at $135 per acre and later in the afternoon increased the offer to $185 per acre on the ground that he had been so authorized by his company. He further told her that if she had more land in the same section, it would be more valuable. She told Diaz that she couldn't sell without consulting Silverman, whom Diaz denied knowing. Diaz told Miss Duling that when she got ready to sell, to communicate with him in New Orleans. She never saw him thereafter. (R. 906–919.) After the Diaz visit, Silverman advised Miss Duling not to sell and to purchase more land in the same locality. She then purchased a substantial quantity of land from Silverman at $90 and $100 per acre (R. 915–922). Petitioner Safir saw Miss Duling near the end of her transactions with Silverman and sold her five acres at $90 an acre after advising her to purchase the five acres because it would fit in the corner of her land and would thereby be a valuable piece of land to have (R. 925). Miss Duling, during the course

of the foregoing transactions, invested her total life savings, in the amount of $9,750 (R. 930).

ARGUMENT

The facts set forth in the Statement, *supra*, make it clear, as the court below well said, that "the proof presents a record of rascality and scoundrelism of the meanest and lowest kind, with a grinding of the faces of the poor * * *" (R. 2407). Petitioners, however, claim that numerous errors were committed by the trial court as a result of which their convictions should be reversed. Since the contentions in all three petitions are substantially the same, we will discuss them together in the following groupings and order:

1. Errors in the instructions with regard to—
   (a) Presumption of innocence;
   (b) Credibility of witnesses;
   (c) Refusal of petitioners to testify;
   (d) Mailings.
2. Proof of the mailing involved in count 4 and its relation to the scheme to defraud.
3. Proof of petitioners' connection with the mailing involved in count 5 and the relation of the mailing to the scheme.
4. Proof showing a single scheme as charged in the indictment.
5. Proof of mailings in counts 1 and 2.
6. Whether the "cash deeds" involved in counts 1 and 2 are securities within the meaning of the Securities Act of 1933.

1. (a) The trial judge instructed the jury on the presumption of innocence as follows (R. 1703–1704):

> * * * The defendants are not called upon to prove themselves innocent of such charges; they may rely upon the presumption of innocence that attends them at all times until and unless, in the course of the trial, they are proved guilty beyond a reasonable doubt. The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each of the defendants beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who in fact is guilty, so that he or she may escape just punishment. The rule is but a humane provision of law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this presumption of innocence, when, once having retired to deliberate upon your verdict, you review, weigh and consider the whole body of the evidence. As I have stated, the burden rests upon the government, remember to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. But this presumption of innocence will avail the defendants no further, so

> soon as prima facie evidence of the truth of the charges laid against them in the indictment is presented to the jury. That prima facie evidence, if it satisfies the jury, beyond a reasonable doubt, of the guilt of the defendants bars the presumption of innocence, because the presumption is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established. If such prima facie evidence, which so brushes aside the presumption of innocence when found worthy of belief by the jury, is not met by the defendants' opposing satisfactory evidence, then that simple prima facie evidence, if it convinces you gentlemen of the jury, as the final judges of the fact, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilty as charged. * * *

At the conclusion of all of his instructions, the judge asked whether there were any objections or exceptions to the charge, because "if any counsel believes the Court has fallen into unconscious error, the Court will gladly hear suggestions from them for the possible correction of the error" (R. 1723). Counsel for the petitioners in No. 484 raised a question as to the clarity of the instruction regarding the effect of prima facie evidence (R. 1723–1724), whereupon the court further instructed the jury (R. 1724):

> During a part of the Judge's charge, there was specific reference to the subject

> matter to which Mr. Wilkinson referred and addressed the Court on, and the Court did charge you, and did intend to charge you, that if there is a case made out before you, beyond a reasonable doubt, by simple prima facie evidence, that would justify a verdict of guilty. There is no requirement under the law that any defendant offer any testimony. However, if the prima facie evidence, considered by you and deliberated over, convinces you beyond a reasonable doubt that the fact sought to be established has actually been established and proved to you in that fashion, beyond a reasonable doubt, that would justify action by you including a verdict of "guilty". * * *

The judge then asked whether that was "a satisfactory explanation or not," to which counsel replied, "I think so" (R. 1724). No other objections or exceptions were taken by any other of the defense counsel to the instruction in question here (see R. 1723–1739).

The court below held that under the foregoing circumstances petitioners were in no position to claim that error was committed by the trial court (R. 2403). We believe this conclusion is entirely correct, and that petitioners' contentions here that the instruction was highly prejudicial and erroneous (No. 484, Pet. 26–30; No. 485, Pet. 23–32; No. 486, Pet. 14–16) is without merit. In *Gomila v. United States,* 146 F. 2d 372 (C. C. A. 5), upon which petitioners rely, a similar inartfully worded instruction that prima facie proof of guilt beyond

a reasonable doubt is sufficient to overcome the presumption of innocence was held to be erroneous and that such error, accumulated with other errors which made the case a doubtful one on the evidence, required a reversal of the conviction. That is not the situation here. Moreover, the general tenor of the judge's charge on the presumption of innocence was not objectionable. At the outset of the disputed instruction, the trial judge emphasized that the defendants were not called upon to prove themselves innocent but could "rely upon the presumption of innocence that attends them at all times until * * * they are proved guilty beyond a reasonable doubt" (R. 1703). Although he spoke of overcoming the presumption by prima facie evidence, he explained that such evidence must be sufficient to convince the jury beyond a reasonable doubt, and that it could not be thus effective, unless not met by the defendants' opposing satisfactory evidence (R. 1703–1704). Moreover, since additional instructions on this point requested by one of the defense counsel for purposes of clarification were considered satisfactory by such counsel, and since no other objections to this charge were made, it is clear that later contentions on appeal attacking the instruction as unfair and improper were mere afterthought. An almost identical charge was involved in *Pasqua* v. *United States,* 146 F. 2d 522, arising in the same circuit court of appeals. In that case, as here, no timely objection

to the charge was made, and the Fifth Circuit held that "while that charge contains errors, the guilt of the defendants is so overwhelmingly shown by the record that we think the administration of justice does not require us to take notice of such errors." (146 F. 2d at 524.) This Court denied a petition for a writ of certiorari in which that conclusion was urged as error. 325 U. S. 855. Cf. also the charge in *Allen* v. *United States,* 164 U. S. 492, 500. And so here, in view of the overwhelming proof of guilt, the circuit court of appeals properly rejected petitioners' objection to the charge on the presumption of innocence, raised for the first time on appeal. *Johnson* v. *United States,* 318 U. S. 189, 201; *Holmgren* v. *United States,* 217 U. S. 509, 523–524; *Allis* v. *United States,* 155 U. S. 117, 122.

(b) For similar reasons there is no merit in petitioners' complaint (No. 484, Pet. 32–34) as to the court's instruction to the jury that "you will bear in mind that, under the law, every witness is presumed to speak the truth" (R. 1704). The foregoing sentence quoted by petitioners was immediately preceded by the instruction (not quoted) that (R. 1704):

> * * * In considering the credence and weight you should accord the testimony of any witnesses that you have heard testify, you will, as reasonable men, judge his or her demeanor on the witness stand, the manner of his or her testifying, which

717391—46——4

> may or may not have demonstrated to you an apparent lack of fairness, and unexplained hesitation or evasion in replying to any question or questions, or any bias or prejudice, either for or against either the government or any one or more of the defendants. * * *

While a court's statement that witnesses are presumed to tell the truth standing alone might under some circumstances be prejudicial, it could not be thus considered here, since it was tempered by the immediately preceding statement which unequivocally and properly left to the jury the function of judging the credibility of the witnesses from their demeanor in testifying, unexplained hesitation or evasion, or bias or prejudice. Moreover, in considering the claimed possibility of prejudice, it should be noted that the government witnesses were not impeached nor was there any material inconsistency in their testimony on direct and on cross-examination. These circumstances, coupled with petitioners' failure to make any objection or exception to the instruction (see R. 1723–1739), their failure to urge this point as error before the court below, and the overwhelming proof of guilt, forecloses petitioners' contentions that the instruction constituted reversible error.

(c) After the trial judge delivered his original instructions to the jury, counsel for petitioners Bird, Diaz, and Silverman requested him to charge the jury further to the effect that their

failure to take the stand would not give rise to any presumption against them. The other petitioners stated that they did not desire to join in this request. The court refused the charge, stating that the question was "elementary." (R. 1725–1729.) After the jury had been out approximately six hours, the judge recalled them, and, among other things, gave the jury the instruction that had been requested earlier, preceded by the statement to the jury that the court was in error in not granting the instruction when originally requested (R. 1736–1739). The judge then asked whether there were any objections or exceptions to this supplemental charge, but none was made (R. 1739). Petitioners' contention here, as in the court below, that this action of the judge constituted reversible error (No. 484, Pet. 34–36; No. 485, Pet. 34–37; No. 486, Pet. 12–14), is conclusively answered by the opinion below (R. 2404–2405):

> * * * Those defendants who told the court that they did not want any exception to the refusal of the court to give the charge certainly cannot be heard to complain of its not being given when first requested. The other defendants, who did ask for it and who, because they asked, were entitled to it and could, therefore, have complained if it had not been given,* are in no better case. Before the jury brought in its verdict, the court, after

*Bruno v. *United States*, 308 U. S. 287.

frankly confessing error, gave a full and correct charge on the point, and the defendants neither excepted to its giving nor asked further instruction. It is universally held that when an error has been committed and later it is corrected in a formal ruling of the court, it may not be assigned unless it is made clearly to appear that the situation was such that the correction did not remove the effects of the error complained of.** Appellants argue that this is such a case: that the jury having been allowed to go without being properly instructed and having deliberated for many hours, no doubt in that time discussing the failure of the defendants to testify, it was too late to do any good to instruct them in the matter just before they brought in the verdict. On the other hand, it may be more cogently argued that if when the jury came in for instructions they had not been able to make up their minds, but were still undecided, this charge given at defendants' request might well have been of the greatest value to them, indeed of far more value than if given as a part of the general charge. But these are speculations. The law is settled that cases are not reversed unless it appears that the error complained of has reasonably prevented substantial justice being done. Where, as here, the error has been openly confessed and deliberately corrected, with no complaint of

---

**_Volkmor_ v. _U. S._, 13 F. (2) 594; _Frantz_ v. _United States_, 62 F. (2) 737.

> or exceptions to the manner or substance of the correction made at the time, the original failure to give the charge certainly can not be held reversible error.***

***Johnson* v. *U. S.*, 318 U. S. 189; *United States* v. *McGuire*, 64 F. (2) 485; *Burton* v. *U. S.*, 196 U. S. 283; *State* v. *Moody*, 167 Pac. 676.

Petitioners quote a part of the trial judge's instructions on the question of proof of mailing wherein the trial judge told the jury that (R. 1714)

> Under such state of facts, it is not necessary for the jury to find that it was any defendant on trial who has been proved to have "placed" or "caused to be placed" [matter in the mails in executing the scheme].

Petitioners contend that the judge committed a very fundamental error in giving this instruction in that he told the jury in effect that petitioners need not be shown to have had any connection with the mailing in order to find them guilty (No. 484, Pet. 36–37). If the foregoing quotation were the only charge given the jury on the question of the required connection with the mailings, there might be some merit in petitioners' position. However, petitioners have extracted this portion of the charge from its context; the entire charge on this subject made it clear that the jury could not find petitioners guilty unless they were shown to have had some connection with the mailing. Thus, in the sentences immediately preceding that

quoted by petitioners, the judge instructed (R. 1713–1714):

> * * * The word "caused" in the phrase used "placed or caused to be placed" in the mails has a relatively broad meaning and importance as the Supreme Court of the United States has held, and is used in the mail fraud statute in its well known sense of "bringing about". Therefore, when the indictment charges that these defendants "caused to be placed" certain therein described mailable matter, under the remaining counts four and five, of the original four mail fraud counts, the said defendants are one and all charged with having brought about the use of the mails in the execution of their alleged previously concocted scheme and artifice to defraud,—no matter that none of them ever contemplated or intended the use of the mails for the carrying out of such scheme;—no matter that none of them knew that the mails were being so used, they are, one and all, responsible for such misuse of the mails, if the use of the post office establishment was the natural, proper consequence of their act in so forming and planning said scheme or artifice to defraud, and might reasonably have been anticipated and foreseen by them.

This instruction was a sound exposition of the applicable legal principles. See, e. g., *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Graham* v. *United States,* 120 F. 2d 543, 546 (C. C. A. 10);

United States v. *Weisman,* 83 F. 2d 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Corbett* v. *United States,* 89 F. 2d 124 (C. C. A. 8); *Smith* v. *United States,* 61 F. 2d 681, 684 (C. C. A. 5), certiorari denied, 288 U. S. 608. It is apparent, therefore, that the charge as a whole gave the jury a clear and correct impression of the legal principles applicable in determining petitioner's responsibility for the use of the mails. That it must have been so understood by petitioners is apparent also from the fact that no objection or exception of the character here in question was made when the instruction was given (see R. 1723–1739), nor was this point raised in the court below. Under such circumstances, petitioners are in no position to make such a contention here.

2. Count 4 of the indictment was based upon a sale by petitioner Diaz to Mr. and Mrs. M. E. Fowler (R. 28–29). In connection with that sale, Mr. Fowler gave Diaz a check dated June 26, 1940, for $1,395, drawn on a Pensacola, Florida, bank, payable to Diaz (Gov. Ex. 323, R. 2155). Diaz deposited the check in his New Orleans bank, and thereafter, according to the testimony of an official of the New Orleans bank, the check was cleared in the ordinary course of business through the United States mails for collection on the drawee bank in Pensacola (R. 1026–1030). Petitioners raise several objections to the proof on this count. First, they argue

that the use of the mails was not clearly shown, since the envelope in which the check was transmitted was not introduced in evidence, and because the use of the mails was proved only by custom and usage; and second, that the clearance of this check through the mails was not part of the scheme to defraud but came after the completion of the particular sale in question, so that mailing was not a basis for conviction for mail fraud under the controlling authority of *Kann* v. *United States,* 323 U. S. 88 (No. 484, Pet. 22–23, 43–44).

As to the first objection, introduction of the envelope is not an absolute prerequisite to proof of mailing, and the testimony of a bank official based on custom and usage and upon special markings on the check itself, are sufficient evidence from which a jury could infer, as the jury here apparently did, that the check was actually transmitted through the mails. *Decker* v. *United States,* 140 F. 2d 378, 379 (C. C. A. 4), certiorari denied, 321 U. S. 792; *United States* v. *Leathers,* 135 F. 2d 507, 510 (C. C. A. 2); *Savage* v. *United States,* 270 Fed. 14, 20–21 (C. C. A. 8), certiorari denied, 257 U. S. 642. The second question raised by petitioners, as to the application of the *Kann* case, at first blush appears to have some merit. The instant case is parallel to the *Kann* case in that, in a sense, Diaz might be said to have had the fruits of his fraud in hand prior to the mailing of the check, and, in addition, the particular

sale to the Fowlers, in connection with which the check was given, had been made prior to this mailing. However, the parallelism ends at this point. This sale to the Fowlers in June 1940 was only one in a series of numerous sales made by various petitioners to them during a period from March 1939 to March 1941 (cf. R. 1192, 1282), and all of these sales were, in turn, only one small part of the scheme in its totality. The scheme charged and proved was a continuing one which was far from complete at the time the particular check was cleared through the mails. And it was necessary to its execution that nothing should arise at any time which would create suspicion on the part of any of the investors; everything had to work smoothly to keep all of the investors lulled into the feeling that they were participating in an honest and fruitful enterprise. It follows, therefore, that it was essential to the scheme to defraud and to the continuing activities of petitioners that the check should clear smoothly and in proper fashion. Under such circumstances, in view of the scope and continuing character of the scheme to defraud, it cannot be said, as in the *Kann* case, where only a single and short lived scheme was involved, that the clearance of the check was brought about after the scheme had reached fruition. On the contrary, as in *Decker* v. *United States, supra,* in which certiorari was denied on March 27, 1944, shortly before the granting of

certiorari in the *Kann* case, 321 U. S. 761, the mailing by the bank here was intimately connected with and essential to the smooth and uninterrupted functioning of the continuing scheme. See also *Corbett* v. *United States,* 89 F. 2d 124, 125–126 (C. C. A. 8).

3. In respect of count 5, petitioners in No. 484 contend that the proof was insufficient both as to their connection with the mailing and as to showing that the mailing was a part of the scheme to defraud (Pet. 49–50). Count 5 was predicated on one of the transactions with Miss Duling, in connection with which she received, at Jackson, Mississippi, a recorded "cash deed" mailed from the clerk's office at Pointe a la Hache, Louisiana, on April 15, 1941. No question is raised as to proof of mailing, since the envelope in which the deed was transmitted was introduced in evidence (Gov. Ex. 74, R. 1861). The claim that some of the petitioners were not shown to have had any connection with this mailing is negated by the proof, outlined in the Statement, *supra,* and analyzed under point 4, *infra,* showing that all of the petitioners were engaged in a single, continuing scheme to defraud. Petitioners, however, urge that the mailing of this deed was no part of the execution of the scheme to defraud, since Miss Duling had already paid money for the tract involved and acquired title prior to this mailing, and they cite the second decision of the Circuit Court of Appeals for the Tenth Circuit in *Mitchell*

v. *United States,* 126 F. 2d 550. The first *Mitchell* decision, 118 F. 2d 653, was based upon an indictment charging mail fraud in connection with a single transaction involving the sale of land. The mailing was predicated, as in the instant case, on the transmittal of a recorded deed to the purchaser. The Tenth Circuit held that the mailing of this recorded deed played no part in the execution of the scheme charged in the indictment, since that scheme did not envisage recording and was complete before the mailing occurred. Thereafter, the Government secured a new indictment charging, as here, a continuing scheme to defraud many victims. On appeal from the second conviction, the Tenth Circuit held that the conviction was good on the basis of the proof adduced and was within the framework of the indictment, since recording was envisaged by the continuing character of the fraud charged and proved. It is apparent, therefore, that the first *Mitchell* decision has no application here and that, as in the second case, the indictment and proof here showed that the mailing of the recorded deed occurred in the course of a continuing scheme to defraud both the particular investor and other investors. Not only were other sales subsequently made to Miss Duling (see Gov. Exs. 75–76, R. 1861–1866), but the sale in question was not complete until she received the "cash deed" mailed on April 15, 1941. Moreover, it is evident that recordation played a vital part in petitioners' scheme (see Statement, *supra,* pp.

13–14) in that it lent an air of authenticity and propriety to the transactions, and thus allayed suspicion while petitioners practiced their scheme to load and reload the particular investor and to ensnare other victims. Cf. *United States* v. *Earnhardt,* 153 F. 2d 472, 473–474 (C. C. A. 7), certiorari denied June 3, 1946, No. 1158, O. T. 1945. Under such circumstances, the recordation was far from an incidental or collateral phase of the scheme, but was an integral part of its execution.

4. Petitioners also contend that while the indictment charged a single scheme to defraud and they were tried and convicted on this theory, the proof in fact showed several separate and independent schemes (No. 484, Pet. 51–52; No. 485, Pet. 8–22; No. 486, Pet. 21–22). Ancillary to this argument are the several contentions that proof of one petitioner's connection with a particular sale or mailing could not be effective against the others (see, e. g., No. 484, Pet. 44–45, 50; No. 485, Pet. 15–16). Petitioners rely upon the recent decision of this Court in *Kotteakos* v. *United States,* decided June 10, 1946, Nos. 457 and 458, O. T. 1945.

It is settled, of course, that in a mail fraud prosecution, the Government need only establish that particular transactions were in furtherance of a common scheme in which various defendants are implicated, not that each defendant participated in each transaction. *United States* v. *Cohen et al.,* 145 F. 2d 82, 90–91, (C. C. A. 2), cer-

tiorari denied, 323 U. S. 799. The only question for discussion, therefore, is whether the proof showed that petitioners were, as charged, implicated in a single scheme to defraud. From the character of the proof summarized in the Statement, *supra,* particularly on pp. 9–13, it is abundantly clear that petitioners can draw no comfort from the *Kotteakos* decision and that one single scheme was established. As the court below stated R. 2408):

> * * * the record leaves in no doubt that they formed one wolf pack. It shows a concerted, plotting, scheming, and conniving in loading and reloading their victims, a concerted scurrying hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan.

This concerted plotting and conniving is evident from several different aspects of petitioners' activities. Thus, in almost every case, the so-called "cash deeds" which the various investors received were signed by Baker as president of the Plaquemines Land Company. Most, if not all, of the petitioners at one time or another represented to various investors that they were working for or connected with the Plaquemines Land Company. The record also shows that the combinations of petitioners which operated in

"wolf packs" against various investors shifted at various times, so that at one time or another every petitioner worked with almost every other petitioner in effecting sales. The shifting of personnel and the relations of petitioners to each other is unequivocally shown in the Appendix, *infra,* pp. 46–48. In this setting the *Kotteakos* decision, where the only common denominator between all the defendants was the isolated fact that a single defendant was shown to have had dealings with all the others, is inapposite. As in typical mail fraud, security fraud, and narcotics ring cases, this case is one in which all of the petitioners were shown to have been working in a common scheme under common direction, with a common interest and profit and with mutual relationships and timing of action in which the activities of one were intimately related to the activities of the others. This was no mere thread that bound petitioners together, but rather a mutually binding chain of a common effort under which they were working one for all and all for one. Therefore, there was no error whatsoever in charging, trying, and convicting petitioners on the theory, abundantly proved by the evidence, that they were engaged in a single conspiracy.

5. Petitioners also complain of the proof of mailings on which counts 1 and 2 were predicated (No. 484, Pet. 38–39). Since, as we have shown, petitioners were validly convicted under counts 4 and 5, and since those counts sustain

the concurrent sentences imposed, it is unnecessary to inquire into the validity of the convictions on counts 1 and 2. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105. In any event, petitioners' contentions in respect of these counts are untenable.

Counts 1 and 2 alleged the mailing of certain letters addressed to the Deposit Guaranty Bank, Jackson, Mississippi, on the letterhead of petitioner M. C. Baker, 2110 Audubon Street, New Orleans, Louisiana, and signed in his name as president of the Plaquemines Land Company (R. 19–22; Gov. Ex. 143–144, R. 1992–1994). Each of the two letters stated that there were enclosed the original and two copies of a deed executed by Plaquemines Land Company in favor of Nathan Silverman for acreage (10 and 5 acres, respectively) in Section 30, Township 17 South, Range 17 East. An officer of the addressee bank testified that the letters were received by the bank through the mails, for they bore a stamp of the bank's mail department which was placed only on letters received in the mails (R. 450–456). While the deeds were not introduced in evidence, the bank official identified bank records showing that the enclosures had been received and that, as requested in the letters, credits had been entered in the Hibernia National Bank for the account of the Plaquemines Land Company for the money paid when the deeds were delivered in accordance with the instructions in the letters (R. 450–451; Gov.

Ex. 143a, R. 1992; Gov. Ex. 144a, R. 1994). In addition, the record shows that the parcels of land referred to in the letters were included in a tract under an exploitation lease to Gulf Refining Co. which provided for the division of undivided royalty interests among the owners of parcels in the tract, and that parcels in the same section (30) were sold by Silverman to Miss Duling, of Jackson, Mississippi (see R. 923; Gov. Ex. 75, R. 1861–1863). In view of the testimony of the bank official, there can be no question as to the adequacy of the proof of the receipt of the letters through the mails. And that they were mailed by Baker, acting for Plaquemines Land Co., whose purported signature the letters bore, is evident from the following: (1) the letters referred to land which Plaquemines Land Co. controlled; (2) credits for the payments for the parcels referred to in the letters were, in accordance with instructions in the letters, made and received for the account of Plaquemines Land Co.; and (3) Baker and Silverman were shown by other substantial evidence to have had close relationships in the affairs of the Plaquemines Land Co. Cf. *McNear* v. *United States,* 60 F. 2d 861 (C. C. A. 10). Moreover, since the letters carried a letterhead with a New Orleans address which was shown to be the base of operations for Plaquemines Land Co., there was substantial basis for inferring that the mailing occurred in New Orleans. Cf. *McIntyre* v. *United States,* 49 F. 2d 769 (C. C. A. 6). These

factors collectively were sufficient circumstantial evidence to establish a prima facie case to go to the jury for their determination whether Baker mailed the letters from New Orleans to the bank in Jackson. Cf. *Steiner* v. *United States,* 134 F. 2d 931, 934 (C. C. A. 5), certiorari denied, 319 U. S. 774; *Corbett* v. *United States,* 89 F. 2d 124, 127 (C. C. A. 8); *McNear* v. *United States,* 60 F. 2d 861, 863 (C. C. A. 10); *McIntyre* v. *United States,* 49 F. 2d 769 (C. C. A. 6).

6. Petitioners argue further that there was no proof of the character of the deeds enclosed with the letters involved in counts 1 and 2, since these deeds were not introduced in evidence, and that even if the deeds were presumed to be like the other "cash deeds" in evidence, they were not securities within the meaning of the Securities Act of 1933 (No. 484, Pet. 40–42; No. 486, Pet. 9–12). However, there was an abundance of circumstances from which the jury could properly have inferred that these deeds were typical of the many "cash deeds" in evidence. Briefly, those circumstances were that the parcels referred to in the letters were included in a section and a larger tract controlled by Plaquemines Land Co. and sold to numerous investors by petitioners in small parcels of a comparable size; that the large tract referred to in the letters was under an exploitation lease to Gulf Refining Co., under which royalties were reserved to the title

holders; that in every other of the many instances of sales of parcels of the land in the tracts under lease to Gulf, petitioners employed the "cash deed" device; and that Baker and Silverman were principal figures in the operations of Plaquemines Land Co. It is apparent, therefore, that the jury properly concluded that the deeds referred to in the letters upon which counts 1 and 2 were predicated must have been so-called "cash deeds."

The "cash deeds" utilized by petitioners were, by their language and the circumstances of their use, securities under Section 2 (1) of the Securities Act of 1933 (*supra,* p. 3), both as "fractional undivided interests in oil rights and as "investment contracts." The deeds typically recited that the grantee was given, in addition to the land, less the mineral rights therein, "an undivided Prorata Part of All the Mineral Rights" in the larger described tracts already under a lease providing for payments of royalties to the land owners (see Statement, *supra,* p. 13). By its literal language, therefore, the "cash deed" conveyed to the investor-purchaser not merely particular acreage, but also an undivided share with other investor-purchasers in potential oil royalties. In terms the deed falls squarely within the meaning of a "security" as defined in the Securities Act, which includes, *inter alia,* "fractional undivided interests in oil

and gas right" (see p. 3, *supra*).[6] And the substance of the transactions with the many investor-purchasers supports the conclusion that petitioners were selling "investment contracts" within the meaning of the definition "security" in the Act. Petitioners impressed investors with the fact that they were selling the land because of its value as oil land and for the profit that the investors might realize from their undivided interests in the royalties that would result from exploitation, or from resale of the acreage by the promoters. Indicative of the intent of the promoters is the fact that they had attempted to persuade the Gulf Refining Company to continue its exploitation leases and that the promoters' objective was to enable them to represent that the lands were under exploitation by Gulf. Moreover, the land conveyed by the "cash deeds," being marsh land unsuitable for residential or cultivation purposes, had little or no value independent of the success of the promised oil exploitation. The investors purchased the land at high prices primarily on the basis of these representations and not because they could or intended to occupy, utilize, or develop the land themselves. Under such circumstances, it is patent that what the investors were offered and what they purchased

[6] Even where the deeds did not employ this literal language, they did actually convey by other language "fractional undivided interests" in the mineral rights. See, e. g., Gov. Ex. 365, R. 2215–2216.

was not land *per se,* but an interest in a speculative promotion, the essence of which was the exploitation and development by others to the end of a mutual sharing by all investors in an undivided interest in oil royalties. In this connection, the decision of this Court in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.,* 320 U. S. 344, is apposite. In that case, certain promoters offered and sold to distant public investors instruments purporting to be assignments of leasehold interests in portions of a three-thousand acre tract of potential Texas oil and gas land, and they represented to investors that they would earn a profit because of drilling operations which were being carried on on the tract. Even though the instruments of assignment did not, as in the instant case, employ terminology unequivocally bringing them within the definition of securities in the Securities Act, this Court held that the defendants were selling "investment contracts" within that definition and stated that (320 U. S. at 348, 349, 352–353):

> Their proposition was to sell documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise. * * *
>
> * * * * *
>
> It is clear that an economic interest in this well-drilling undertaking was what brought into being the instruments that defendants were selling and gave to the

instruments most of their value and all of their lure. The trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end.

* * * * *

Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate. In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be.

See also *Securities and Exchange Commission* v. *Howey*, decided May 27, 1946, No. 843, O. T. 1945; *Mansfield et al.* v. *United States*, 155 F. 2d 952 (C. C. A. 5); *United States* v. *Earnhardt*, 153 F. 2d 472 (C. C. A. 7), certiorari denied June 3, 1946, No. 1158, O. T. 1945.

7. The only remaining issue is the contention of petitioner Johnson that the trial court erred in not granting his motion for a directed verdict predicated on his claim that he had been improperly denied the right to a speedy trial pro-

vided by the Sixth Amendment (No. 486, Pet. 6, 16–21). It is true that almost eighteen months elapsed from the filing of the indictment (September 4, 1942) until commencement of the trial (February 28, 1944). However, it does not follow that this delay abridged the right to a speedy trial, because that right is necessarily relative and must be considered with regard to the practical administration of justice. *Beavers* v. *Haubert,* 198 U. S. 77, 86; see also *McDonald* v. *Hudspeth,* 113 F. 2d 984, 986 (C. C. A. 10), certiorari denied, 311 U. S. 683. Thus considered, there was no substantial infringement of Johnson's rights under the Sixth Amendment. The record shows that Johnson's arraignment was delayed until May 26, 1943, due to his efforts to negotiate a favorable sentence in the event he would plead guilty (R. 190–192, 201–202); that on September 28, 1942, he had been sentenced on another charge in the Southern District of Mississippi to three years' imprisonment in a federal penitentiary and was incarcerated during the interval between the indictment and trial here, but not on account of the instant prosecution (R. 190–192); that due to delay in apprehending one of the defendants (R. 192) and to the crowded calendar of the district court, the case could not be tried at an earlier date (R. 193); and that Johnson did not claim or show that his defense was impeded in any way by the delay or that witnesses on his behalf, if any, were no longer available (R. 192–193).

In the light of such circumstances, the delay in trying Johnson cannot be said to have been excessive or oppressive.

CONCLUSION

The decision below is correct, and the case involves no conflict of decisions. It is respectfully submitted that the petitioners for writs of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

OCTOBER 1946.

APPENDIX

Tables 1 and 2 below are based on an analysis of the record to show the interrelationships of the various petitioners in the many sales of the Plaquemines Parish land. Table 1 lists the names of the petitioners who dealt with each investor-witness, with supporting record references. Table 2 is a summary analysis of the references in Table 1 to show the actual interrelationships.

TABLE 1

[The order of petitioners' names following that of each investor-witness indicates the time sequence of dealings]

Investor	Salesman	Record Ref.
Langlois	Safir and Diaz	(R. 233-234.)
Allen	Kahn	(R. 331, 334-335.)
	Levy & Kahn	(R. 340-341.)
	Kahn and Baker	(R. 341-342.)
Carter	Silverman & Kiefer	(R. 356-357.)
	Silverman, Baker, Kahn & Kiefer.	(R. 374.)
Dupre	Safir	(R. 396-398.)
	Kahn	(R. 406-407.)
	Kahn & Levy	(R. 407-412.)
	Kahn & Levy	(R. 413-415.)
Kahlert	Levy	(R. 465-469.)
	Levy & Kahn	(R. 482-483.)
Koenig	Safir	(R. 532-534.)
	Burgin	(R. 536-537.)
	Safir	(R. 538.)
Lejeune	Kahn	(R. 553-555.)
	Johnson (alias Hunter)	(R. 557-558.)
	Kahn	(R. 563-564.)
	Diaz	(R. 558, 572.)
	Baker	(R. 567-569.)
	Kahn	(R. 565, 570-571.)
	Diaz	(R. 572.)
	Burgin (alias Bryce)	(R. 559.)
	Levy	(R. 573-574.)
	Safir	(R. 574.)
Bergerie	Safir	(R. 631-634.)
	Diaz	(R. 634-638.)
	Johnson	(R. 639-642.)
	Diaz	(R. 644-646.)

TABLE 1—Continued

Investor	Salesman	Record Ref.
Breisacher	Bird	(R. 682–683.)
	Safir	(R. 685–687.)
	Safir	(R. 689–691.)
	Silverman & Johnson (alias Hunter).	(R. 694–699.)
	Levy & Kahn	(R. 713.)
	Levy & Diaz	(R. 713–716.)
	Diaz & Overgaard	(R. 701–705.)
Clifton	Safir	(R. 787–789.)
	Diaz	(R. 791–792.)
Hershey	Kahn	(R. 805–806.)
	Levy	(R. 808–810.)
Daigre	Kahn & Levy	(R. 815–818.)
	Baker	(R. 819.)
	Levy	(R. 820.)
	Kahn & Levy	(R. 822–824.)
	Burgin (alias "Denny")	(R. 821–822.)
	Kahn & Levy	(R. 825–826.)
	Safir	(R. 828–829.)
Koch	Kahn & Levy	(R. 848–852.)
	Kahn & Levy	(R. 852–853.)
Duling	Silverman	(R. 892–894, 897–899, 937–940.)
	Diaz	(R. 905–906, 912.)
	Silverman	(R. 911, 920–922.)
	Johnson & Overgaard	(R. 921.)
	Safir	(R. 924–925.)
Monjure-Matthews	Safir	(R. 966–968.)
	Overgaard	(R. 968–970.)
	Johnson (alias Hunter)	(R. 967–971.)
	Silverman	(R. 974–977.)
	Johnson	(R. 974–975, 978–979.)
Rowe	Diaz	(R. 997–1001.)
	Diaz	(R. 1002–1004.)
	Diaz, Silverman & Kiefer	(R. 1004–1007.)
Harper	Kahn	(R. 1058–1062.)
	Kahn	(R. 1065–1066.)
	Kahn & Baker	(R. 1066–1069.)
	Overgaard	(R. 1070.)
	Diaz	(R. 1071.)
	Baker	(R. 1072–1073.)
Northrop	Manzella	(R. 1092–1093, 1098–1099.)
	Baker	(R. 1102.)
	Burgin (alias Bryce)	(R. 1097–1098.)
Borges	Kiefer	(R. 1104–1106.)
	Kiefer & Silverman	(R. 1107.)
	Silverman & Diaz	(R. 1109–1110.)
Rasmussen	Safir	(R. 1124–1128.)
	Safir & Kahn	(R. 1132–1133.)
	Levy	(R. 1135–1136.)
	Kahn	(R. 1136–1138.)
	Kahn	(R. 1140.)
Cuccia	Kahn & Manzella	(R. 1159–1161.)
	Levy	(R. 1163–1164.)
	Kahn	(R. 1164–1165.)

TABLE 1—Continued

Investor	Salesman	Record Ref.
Fowler-White	Kiefer & Silverman	(R. 1187–1195).
	Diaz & Overgaard	(R. 1220–1224.)
	Burgin (alias Bryce)	(R. 1234–1239, 1260.)
	Diaz & Baker	(R. 1239–1246, 1254, 1259, 1264–1265.)
	Burgin	(R. 1290).
	Kahn	(R. 1291–1294).
Coleman	Kiefer & Silverman	(R. 1422–1423.)
	Bird	(R. 1424.)
	Kiefer, Silverman & Manzella	(R. 1426–1432.)

TABLE 2

[The figure 1 indicates that the petitioners designated were involved in the same sale or sales; 2 indicates that petitioners dealt with the same investor or investors, though not in connection with the same sales; 3 indicates that petitioners accompanied each other when dealing with particular investors. There is no overlapping in the figures given, however, because, in each instance of contact with an investor, only that figure which most aptly describes the interrelationship between the two or more petitioners involved is used. Nor do the figures reflect the number of instances in which the particular relationship existed, although that factor is partially illustrated in Table 1.]

	Baker	Silverman	Kahn	Levy	Safir	Bird	Johnson	Burgin	Diaz
Baker	xxxxx	3	1, 2, 3	1, 2	2	-----	2	1, 2	1, 2, 3
Silverman	3	xxxxx	3	1	2	1, 2	1, 2, 3	2	1, 2, 3
Kahn	1, 2, 3	1, 2, 3	xxxxx	1, 2, 3	1, 2, 3	2	1, 2	1, 2	1, 2, 3
Levy	1, 2	1	1, 2, 3	xxxxx	2	2	1, 2	1, 2	1, 2
Safir	2	2	1, 2, 3	2	xxxxx	2	2	1, 2	1, 2, 3
Bird	-----	1, 2	2	2	2	xxxxx	2	2	2
Johnson	2	1, 2, 3	1, 2	1	2	2	xxxxx	2	1, 2
Burgin	2	2	1, 2	1, 2	1, 2	2	2	xxxxx	2
Diaz	2, 1	1, 2, 3	1, 2	1, 2, 3	1, 2, 3	2	1, 2	1, 2	xxxxx

U. S. GOVERNMENT PRINTING OFFICE: 1946